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School Law Bulletin

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Home Schooling and Compulsory School Attendance

by Josef Wendel, William Konnert, and Charles Foreman

Parents show concern for their children's upbringing and education in many ways. In recent years, by educating their children at home, parents have increasingly demonstrated dissatisfaction with both the public and private educational options available for their children. Home schooling, as this movement is commonly called, has gained the attention of lawmakers, educators, and the media.

Many parents are dissatisfied with public and private schools because of their religious beliefs or because they disagree with the governmental establishment on such subjects as safety, morality, control over children, involuntary busing, and government intervention in education. Some of these parents have therefore removed their children from school and are teaching them at home.

Where state law prohibits home schooling, parents who violate state compulsory school attendance laws by educating their children at home risk criminal charges, fines, jail sentences, and other legal sanctions. But despite these serious consequences, violations of state compulsory school attendance laws are increasing. The actual number of families that engage in home schooling is difficult to determine, since many families do not want to be identified, fearing prosecution and harassment. A large number of parents hide their children as they defy the law. National estimates of the number of home schoolers range from 10,000 to 30,000.

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Three Benchmark Cases

Each state controls the education of all children residing there, but that control is limited by constitutional constraints. In 1923 the United States Supreme Court stated in *Meyer v. State of Nebraska* that "[t]he education of youth is a matter of such vital importance to the democratic state and to the public weal that the state may do much, may go very far indeed, by way of limiting the control of the parent over the education of the child."[1] But the Court went on to say that parental privileges recognized in common law were protected by the due process clause of the Fourteenth Amendment. In *Meyer,* the Court held unconstitutional a Nebraska statute that prohibited the teaching of a modern language other than English to students who had not completed the eighth grade in any private, parochial, or public school in that state. The defendant, a private school teacher, was convicted of teaching German to a child who had not advanced beyond the eighth grade. In overturning the conviction, the Court held that the statute violated the defendant's right to teach, the student's right to learn, and the parents' right to choose, within bounds, what their children would be taught. The Court found these rights to be liberties entitled to due process protection under Fourteenth Amendment. It held Nebraska's statute to be unreasonable and arbitrary and, therefore, an unconstitutional infringement of the liberties of teachers, students, and parents.

1. Meyer v. Nebraska, 262 U.S. 390, 43 S.Ct. 625 (1923).

In *Pierce v. Society of Sisters* (1925), the Supreme Court applied the principle established in *Meyer.* Voters in Oregon had approved legislation that required that children between eight and sixteen years of age be educated in public schools. The Court unanimously affirmed a lower court injunction, declaring that the Oregon compulsory public school statute violated the Fourteenth Amendment. It found that requiring parents to send their children to public school only, without recourse to a private school alternative, "interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."[2]

In most states, private schools must be "approved" by the state. In some states the state department of education grants such approval; elsewhere the local school board has that responsibility. Approval usually consists of a determination by the responsible body that the private school (1) is physically safe; (2) provides equivalent curriculum and instruction; (3) complies with the requirements for length and duration of school days and school year; and, in some states, (4) provides instruction by certified or qualified personnel.

Under these conditions, the issue of state power and parental control was not overtly raised until 1972, when the Supreme Court again addressed the problem in *Wisconsin v. Yoder.*[3] This landmark case involving parental rights and state responsibility marked an extension of freedom of religion into the field of education. In earlier cases, the Court addressed the question of parental freedom to choose educational alternatives for their children, but in *Yoder* the Court applied the First Amendment right of free exercise of religion. Until *Yoder,* the courts had consistently rejected "free exercise" arguments for home schooling. The Court in *Yoder* asserted that a parental religious right could outweigh the state's interest in compulsory school attendance. But parental rights must still be measured against the educational interests of the state. The defendants in *Yoder* were member of the Old Order Amish religion and the Conservative Amish Mennonite Church. They were convicted of violating Wisconsin's compulsory attendance law that required school attendance until the age of sixteen. The parents were fined $5 each for refusing to send their children to a public or private school after they had graduated from the eighth grade. The parents claimed that application of the compulsory attendance law violated their rights under the First and Fourteenth amendments of the United States Constitution. They argued that attendance at high school is contrary to the Amish religion and way of life and that such attendance would expose their children to criticism in the church community and, according to Amish belief, endanger the salvation of both the parents and their children. The Old Order Amish believe that salvation requires life in a church community that is in harmony with nature and the soil. The State of Wisconsin advanced two primary arguments in support of compulsory school attendance: its interest in preparing children to be effective citizens, and its interest in helping them become economically self-reliant members of society. The Court concluded that neither of these interests would be furthered by an additional one or two years of public education. The Amish demonstrated the adequacy of their alternative mode of continuing informal vocational education, and the Court accepted that home instruction as a type of schooling.

No higher court has limited the power of a state to insist that any form of alternative education, including home schooling, be approved by an official agency before the alternative is acceptable.

Responding to the state's interest in developing political effectiveness, the Court pointed to the ability of the Amish to survive as a separate community as "strong evidence" of their ability to engender social and political responsibilities. As for the state interest in developing self-reliant and self-sufficient citizens, the Court characterized the Amish vocational education as "ideal" in terms of preparing Amish adolescents for life in the Amish community. As for those who might choose to leave the community, the Court noted there was no evidence that they were doomed to

2. Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571 (1925).
3. Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526 (1972).

become "burdens on society." It did not discuss the significance of the fact that Amish children did receive eight years of state-regulated education.

In *Yoder* the Court delineated elements that would trigger constitutional protection: Parental interests must be religious in nature, rather than philosophical or personal. The religious interest must be longstanding and sincerely held. Continued secular education must pose a real, rather than perceived, threat to the religious interests involved. And the disruption to the child's formal education should not seriously impair his future or threaten the public order in any significant way. The Court found not only that the Wisconsin compulsory school attendance law infringed on the defendants' religious freedom but also that the state failed to prove that its interest in keeping these children in school overrode the defendants' right to the free exercise of their religious beliefs. The Court found that the interdependence between Amish religious beliefs and the Amish way of life was threatened by continued attendance at secular schools. There was no dispute as to the sincerity of the Amish claims, nor that they were religious in nature rather than philosophical or personal. The Court found that the Amish system would not harm the child in any significant way or threaten the public safety, peace, or order.

In *Yoder* the Supreme Court recognized a parental religious right that could outweigh the state interest in compulsory school attendance. In that case the parents won the right to educate their children at home after the eighth grade, but the power of the state to provide education for citizenship and self-sufficiency was reaffirmed. The parents did not claim a total exemption from education away from the home for their children, and the state was empowered only to monitor the continuing program of vocational education.

Impact of Compulsory Education Statutes on Home Schooling

Compulsory education statutes generally fall into one of three categories: (1) those that provide an implied exception for home schooling with open-ended language like "equivalent instruction elsewhere" or nonspecific references to correspondence courses or tutoring, (2) those that provide no exception beyond the alternatives of public or private schools, and (3) those that provide an explicit exception for home schooling. This discussion centers primarily around the first and second types of statutes, for in states where home schooling is explicitly permitted, litigation has been minimal. In some instances, however, the legal issues apply to all three categories.

Implied-Exception Statutes

Seventeen states have statutes that imply through "equivalence clauses" that home schooling is acceptable.[4] In these states, parents may satisfy the compulsory public school attendance requirements by demonstrating that their children are as proficient in the subjects generally taught in the public schools as are public school children of a comparable age. The Missouri statute, for example, contains an equivalency clause that reads in part "[that parents alternatively] shall provide the child at home with regular daily instructions during the usual school hours which shall, in the judgment of a court of competent jurisdiction, be at least substantially equivalent to the instruction given children of like age in the day school in the locality in which the child resides. . . ."[5]

As part of their "equivalency clauses," some states have conditions that parents who wish to have their children educated in a manner other than through the public schools must meet. These conditions vary greatly. Some examples follow:

—Approval required by a governing board (three states), by the state board of education (two states), or by the county board of education (West Virginia).
—Instruction in the same branches of study as are prescribed for the public schools (five states).
—Reports to appropriate school officials (two states).
—Basic instruction given only in the English language (three states).
—Daily "supervised" instruction (Montana).
—Requirements that the instructor be "qualified" (two states) or "competent."
—Requirements that home schooling be conducted for a prescribed period of time (three states).
—Determination by the local school superintendent, by examinations or other means, that instruction is adequate.
—Statutory exemptions of varying duration for children who are members of a regularly organized church or denomination that objects to attendance at public school (Kansas and Iowa).

The "equivalency clauses" of some states contain no qualifications. If the statute contains an "equivalency clause" without any qualification, the parent or guardian of the child may arrange for the child's education outside of a school

4. The states with "equivalency clauses" are Alaska, Connecticut, Delaware, Idaho, Indiana, Iowa, Maine, Maryland, Massachusetts, Missouri, Nevada, New Jersey, Oregon, South Carolina, South Dakota, Vermont, and Wisconsin.

5. MO. REV. STAT., 167.031 (1975).

as long as the child is demonstrably receiving education equivalent to that which he would receive in the public schools. Home schooling would thus be an acceptable educational alternative. The equivalency referred to in these statutes is academic and not social. If the child has indeed received equivalent academic education, then he must be able to show proficiency in the same subjects as are taught in the public schools. Because the equivalency clauses are so ambiguous, these statutes have generated the most legal confrontations. Some of the more germane cases are discussed below.

Massachusetts not only enacted the first compulsory school attendance law but also was the first state where it was argued that home instruction was permitted by an implicit reference in the statute. In *Commonwealth v. Roberts*,[6] the court did in fact interpret the Massachusetts compulsory school attendance law as implicitly permitting home education. The Massachusetts statute stated that "[e]very child . . . shall attend a public day school . . . or some other day school . . . but such attendance shall not be required of a child . . . who has been otherwise instructed."[7] The Massachusetts Supreme Court interpreted the "otherwise instructed" language to permit home education. The court declared that "the great object of [compulsory attendance] provisions . . . has been that all children be educated, not that they be educated in any particular way."[8] The court stated that the instruction could be provided by a private tutor, by a governess, or by the parents, if the instruction was given "in good faith" and was "sufficient in extent."

Qualifications of teachers are often used in determining equivalence of home schooling. When statutes do not specifically address teacher qualification requirements, courts have usually assumed competence of teachers without requiring certification. For example, in *State v. Massa*,[9] the New Jersey court held that Mrs. Massa, a parent who provided most of her daughter's instruction, need not be certified by the state. From its observation of her testimony and her presentation of oral arguments during the trial, the court was satisfied that Mrs. Massa was competent to teach her daughter the basic subjects from grades one to eight even though Mrs. Massa's education did not go beyond high school and she had no prior teaching experience.

When the statutes require certification of teachers, the courts have usually upheld the requirement, as in the Iowa case of *State v. Moorehead*.[10] In Iowa, home schooling is permitted when it involves a certified teacher who gives "equivalent" instruction. The defendants contended that it was unclear whether the term "certified teacher" meant that the teacher must be "certified" by a licensing agency or merely "competent." The state supreme court concluded that "the term should cause no difficulty for citizens who desire to obey the statute,"[11] and it held that the burden of proving that a child's instruction is "equivalent" to that of public schools was on the parents. The defendants produced no evidence of equivalent instruction and were convicted of violating the compulsory school attendance law.

"Equivalency" decisions have also been based on other factors, as the following cases show. New York law allows for alternative education so long as it is "substantially equivalent" to the education offered in public schools. New York courts have tended to be strict in applying the statutory standards. In *In re Franz*,[12] for example, a parent was convicted of child neglect for teaching her children at home without obtaining certification as a teacher and for not providing instruction substantially equivalent to instruction in public schools. The court upheld the conviction, finding that the requirement of five hours of instruction per day was not unconstitutional, nor did it impinge on the right of privacy. The court was sympathetic to the motives and intentions of Mrs. Franz but concluded that schooling at her home was not substantially equivalent to that offered in the public schools because she instructed her two children for only 1½ hours a day and because the subjects she covered were determined by the children's interests rather than by New York's education law.[13] The court did not address the question of Mrs. Franz's competence to teach.

In *Perchemlides v. Frizzle*,[14] a Massachusetts court held that the state may neither require parents to be certified nor require that they provide a curriculum identical to that of the public schools. The Massachusetts statute exempts children who are "otherwise instructed in a manner approved

6. Commonwealth v. Roberts, 159 Mass. 372, 34 N.E. 402 (1893).
7. MASS. GEN. LAWS ANN., Ch. 76, § 1 (West 1971).
8. Roberts, 159 Mass. at 374.
9. State v. Massa, 95 N.J. Super. 382, 231 A.2d 252 (1967).
10. 308 N.W.2d 60 (Iowa 1981).
11. *Id.* at 64.
12. *In re* Franz children, 55 App. Div.2d 424, 390 N.Y.S.2d 940 (1977).
13. *Id.* at 427, 390 N.Y.S.2d at 942. *See In re* Lash, 9 Misc. 2d 642, 401 N.Y.S.2d 124 (1977). *See also In re* H, 72 Misc. 2d 59, 337 N.Y.S.2d 384 (N.Y. Fam. Ct., Yates County 1974). The court found the parents guilty of child neglect because the instruction with which they furnished their children at home was inadequate. *See In re* Skipwich, 14 Misc. 2d 3252, 280 N.Y.S.2d 852 (Family Ct., N.Y. City 1958) (court permitted white children to be instructed at home because parents objected to the quality of schooling at the predominantly black school to which they were assigned).
14. Perchemlides v. Frizzle, Civil No. 16641 (Hampshire Superior Court, Mass., Nov. 13, 1978), unreported decision.

in advance by the superintendent or the school committee from the compulsory attendance law."[15] The court held that parents have a general right to choose home schooling for whatever reason, not just for religious reasons. It declared, however, that this right is not absolute and is subject to reasonable regulation by the state through local public school officials. The court concluded that this state control "must be framed so as to allow home education to remain a feasible alternative for parents who are educated and who can provide instruction in the subjects that are taught in the public school."[16] In addition, the court said that (a) a child taught at home should receive the same number of hours of instruction as a public school student, and (b) school authorities must be satisfied that the "parents are competent to teach and that they are doing so diligently, consistently, and in good faith."[17] School authorities could periodically test the home-educated child to ensure that minimum standards were being maintained. The court cited factors that the local school officials could consider in evaluating a home schooling program: teacher competence (not necessarily certification), the number of hours and days devoted to instruction, subjects taught, adequacy of educational materials, and availability of periodic tests for measuring academic progress. School officials were not to look to the parents' motives, the lack of a curriculum identical to that provided in the public schools, socialization, or the creation of a precedent for future home schooling proposals if the plan should be approved.

The *Perchemlides* court raised the issue of whether home schooling is a constitutionally protected right. It held that once a right to home schooling is permitted by statute, parents are constitutionally entitled to "a high level of procedural due process protection from arbitrary, capricious, or even malicious conduct on the part of the school officials who are authorized to evaluate and decide on the equivalence of a given program."[18] The procedural matters outlined by the court to be used in providing due process to the parents are: prior notice of the form and substance of the hearing before the school committee, the right to examine witnesses, the right to representation by counsel, an impartial hearing body, transcription of the hearing, compliance with open-meeting laws, and specific written reasons given for the denial of approval.[19] In *Perchemlides*, the court found that the parents had not been given the necessary procedural protection and ordered that the local school authorities hold a new hearing that would follow the court's procedural directives.[20]

No-Exception Statutes

The central question among the statutes that expressly require attendance at either a public or private school, allowing for no other option, has been whether home schooling qualifies as a private school. The decisions on this issue are almost equally divided. Among the cases that permit home schooling, the courts have required that home schooling be equivalent, or substantially equivalent, to the instruction offered to children of the same age in the public schools.

One of the earliest cases to interpret private schooling narrowly was *State v. Counort*,[21] decided in 1912 in the State of Washington. Counort was charged with being a disorderly person for not sending his children to school, either public or private, without an excuse by the superintendent. Counort contended that he was an experienced teacher who was qualified to teach all subjects required by the public schools of the state and that he was maintaining a private school. The Washington Supreme Court, rejecting his appeal, found that the evidence did not show that the defendant maintained a private school at his home but instead showed that the children were playing at home rather than learning. Commenting on the distinction between home schooling and a private school, the court stated:

> We do not think that the giving of instruction by a parent to a child, conceding the competency of the parent to fully instruct the child in all that is taught in the public schools, is within the meaning of the law "to attend a private school." Such requirement means more than home instruction. It means the same character of school as the public school, a regular, organized and existing institution, making a business of instructing children of school age in the required studies and for the full time required by the laws of this state.[22]

The New Hampshire compulsory school attendance law withstood a challenge in *State v. Hoyt* (1923).[23] As in *Counort*, the defendants claimed that they were maintaining a private school at their home and therefore were not

15. MASS. GEN. LAWS ANN. Ch. 76, § 1 (1971).
16. Perchemlides at 12.
17. *Id.*
18. *Id.* at 13, *citing* State v. Massa, 231 A.2d 252 (N.J. 1967).
19. *Id.* at 28, 29.
20. *Id.*. The major procedural flaws the court found were that the school authorities did not properly notify the parents of what was expected of them, nor did their home-schooling program receive a careful, good-faith evaluation.
21. State v. Counort, 69 Wash. 361, 124 P. 910 (1912).
22. *Id.*
23. State v. Hoyt, 84 N.H. 38, 146 A.170 (1929).

violating the state compulsory school attendance law. The defendants' children were instructed in their home by private tutors in the courses required to be taught in the public schools to children of the same age. Affirming the convictions, the New Hampshire Supreme Court did not accept the defendants' contention that such instruction of a child by a tutor in the child's home was a defense to the charge of failure to send the child to school.

The *Hoyt* court found home schooling not comparable with a school because the child would not experience the socialization available in the group learning environment. It also held that home schooling would place an unreasonable administrative burden on the state to supervise the various home schooling arrangements. The rationale that home schooling is inherently inadequate because of the absence of the socialization factor has been used in a number of older cases,[24] but less often more recently.

By further restricting the meaning of the term "school," a decision in the State of Washington has made it even more difficult for parents in that state to offer home schooling. In *Shoreline School District No. 412 v. Superior Court*,[25] the court held that a "school" requires a teacher and that a "qualified" teacher must possess a teaching certificate from the state. Since the parents who were conducting the home schooling program in *Shoreline* were not certified, the court held that they were not operating a school within the meaning of the compulsory attendance statute.

In *State v. Peterman*,[26] an Indiana court found no violation of the compulsory education law when a parent employed a former public school teacher to teach his child at the teacher's house during regular public school hours with a regular course curriculum. This certified teacher did not advertise herself as operating a private school, nor did she have fixed tuition, equipment, or any other students. The court emphasized the academic rather than the social aspect of schooling, stating that a school "is a place where instruction is imparted to the young." It looked to whether instruction complied with the "meaning and spirit of the law" rather than to the number of students in attendance.[27]

In *Scoma v. Chicago Board of Education* (1974),[28] plaintiffs sought to enjoin a school board from enforcing the compulsory school attendance law, contending that home schooling was a fundamental constitutionally protected right. The federal district court concluded that home schooling can qualify as a private school if the standards are at least equal to those of the public school, but it held that the plaintiffs' asserted right to educate their children "as they saw fit" did not merit constitutional protection as freedom of religion.

A parental religious right can outweigh the state's interest in compulsory education, but it still must be measured against the state's educational interest.

A very recent case in this area was decided in North Carolina in 1985, when the state supreme court reversed a state court of appeals decision on home schooling in *Delconte v. State of North Carolina*.[29] The plaintiff had sought declaratory judgment that his home schooling was not prohibited by the North Carolina compulsory school attendance statutes—or, if it was, that these statutes contravened certain freedoms guaranteed by the state and federal constitutions.

The facts of this case are as follows. Before moving to North Carolina, the Delcontes had lived in New York. While there, they became associated with a nondenominational, fundamentalist Christian group. Some members of this group sent their children to public schools and some sent their children to private schools. The Delcontes chose to teach their children at home. Their home school was not operated by any church or other organized religious group as part of its religious ministry. The Delcontes used books and

24. *See* Knox v. O'Brian 7 N.J. Super. 608, 614, 72 A.2d 389, 392 (1950); Stephens v. Bongart, 15 N.J. Misc. 80, 92-93, 189 A. 131, 137 (Essex County Ct. 1937); State v. Garber, 197 Kans. 567, 571, 419 P.2d 896, 900 (1966), *cert. denied*, 389 U.S. 51 (1967).

25. Shoreline School Dist. No. 412 v. Superior Court, 55 Wash. 2d 177, 346 P.2d 999, *cert. denied*, 363 U.S. 814 (1960).

26. State v. Peterman, 32 Ind. App. 665, 70 N.E. 550 (1904).

27. *Id.* at 669-70, 70 N.E. at 551.

28. Scoma v. Chicago Bd. of Educ., 391 F. Supp. 452 (N.D. Ill. 1974).

29. Delconte v. State, 313 N.C. 384, 329 S.E. 2d 636 (1985).

materials obtained from sources in New York and the Wake Christian Academy, and instruction included skills in basic reading, writing, and mathematics. A room in their home was equipped with a blackboard and desks and was set aside as a classroom. In addition to formal academic instruction, the children's daily routine included chores, playtime, and Bible study. The instruction continued during most of the year, and no other children were included. Standardized test scores and school work showed that the children were achieving at average levels or higher. The "Halleluja School" maintained annual attendance and disease immunization records, operated on a regular schedule, complied with health and safety inspections, administered appropriate standardized tests, maintained records of test results, provided information concerning its operation to appropriate state officials, and received no state funds.

North Carolina statutes compel every parent, guardian, or person having charge of school-age children to send those children to school for a time period equal to the public schools' time in session.[30] The statute defines schools to include "all public schools and such nonpublic schools as have teachers and curricula that are approved by the State Board of Education."[31]

North Carolina law also requires qualified nonpublic schools to maintain certain annual attendance and disease immunization records, to operate on a certain regular schedule, to be subject to certain health and safety inspections, to administer certain standardized tests and maintain records of the test results, and to provide information concerning its operation to appropriate state officials. The law also requires that a qualified nonpublic school have one or more of the following characteristics: (1) be accredited by the State Board of Education, (2) be accredited by the Southern Association of Colleges and Schools, (3) be an active member of the North Carolina Association of Independent Schools, or (4) receive no funding from the State of North Carolina. The Delcontes' school fulfilled requirement (4). The court held that since the Delcontes' "Halleluja School" met these state requirements, the school was entitled to recognition as a qualified nonpublic school.

The court did not decide whether the statutes could constitutionally preclude home instruction. It did, however, suggest that the North Carolina General Assembly might speak more clearly to the question of whether home schooling ought to be permitted and, if so, the extent to which it should be regulated.

30. N.C. GEN. STAT. § 115C-378 (1983).

31. *Id.*

Explicit-Permission Statutes

The third group of statutes explicitly permit home schooling and therefore have produced minimal litigation. To date, three primary issues have surfaced: (1) whether home schooling constitutes a private school, (2) who determines equivalence, and (3) who has the burden of proof.

The question of whether home schooling constitutes a private school has been the issue of central importance because some of these statutes require teachers in home school, but not teachers in private schools, to be certified. Parents have argued that home schooling is in fact a private school and not merely home instruction. States have argued that parents have been conducting home schooling under the guise of a private school with the sole purpose of evading the statutory requirements.[32] The courts have rigorously enforced the statutes where they have been explicit, insisting on compliance with statutory procedural requirements.

Before *Brown v. Board of Education* was decided in 1954,[33] several southern states aided the home schooling movement by repealing compulsory attendance laws. Louisiana, for example, amended its compulsory attendance law in 1956 to exempt children whose parents objected to their attending any school where integration of the races had been ordered by judicial decree or any other authority. This provision was ruled unconstitutional in 1960.[34]

Conclusion

In the United States, where a child is educated and to what degree is premised on the balance between parental interests and state interests. Whether a child attends a public or nonpublic school or follows a home schooling program, the state retains the power to impose minimum uniform curriculum requirements. Courts have consistently ruled that the state's police power authorizes it to require that all children attend school of some kind and that all children have access to an education of quality. Although a compulsory attendance statute might not specifically authorize home schooling, the statute may entitle the parents to provide equivalent education elsewhere and thus may allow the

32. *See* State v. Nobel, Nos. 5791-0114-A, 5791-0115-A (Mich. Dist. Ct., Allegan County, Jan. 9, 1980); T.A.F. v. Duval County, 273 So. 2d 15 (Fla. Dist. Ct. App. 1973); State v. Superior Court, 346 P.2d 999 (1955); Akron v. Lane, 65 Ohio App. 2d 90, 416 N.E.2d 642 (1979).

33. Brown v. Board of Educ., 349 U.S. 294, 75 S.Ct. 753 99 L.Ed. 1083, (1954).

34. Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960), *aff'd*, 365 U.S. 569 (1961).

option of home schooling. In this case, a showing of compliance with all the state education requirements is generally sufficient to avoid a violation of the compulsory attendance statute. In this respect, it is important to note that to date no higher court has limited the power of a state to insist that any form of alternative education, including home schooling, be approved by an official agency before the alternative is acceptable.

Courts have consistently upheld the constitutionality of state statutes and regulations that are specific and educationally sound, holding such matters as the following to be within the purview of the state: hours of instruction, regularity of instruction, comparability of instruction, educational material requirements, maintenance of records, teacher competency, and measurements of academic achievement. States with "equivalency statutes" phrased in terms that are general or hard to define will do well to examine them and make appropriate adjustments.

When academic proficiency is considered to be the primary purpose of compulsory education, the adequacy of instruction of children in home schools can be explored through testing. Thus one way to ensure adequate home schooling is to establish a schedule of periodic and standardized testing.

Opponents of home schooling often maintain that the cost to the state for monitoring the compliance of home schooling with state requirements would be exorbitant. They cite the numerous opportunities and personal reasons parents may have for noncompliance and argue that for these reasons abuse of the privilege of home schooling is inevitable. These arguments have not generally been received favorably by the courts.

Over the years the burden of proving compliance or noncompliance has shifted somewhat from the parent to the state. In many early cases, parents were held responsible for demonstrating compliance with compulsory education laws. In recent years, states have increasingly had to assume the burden of proving the inadequacy of home schooling. Where the statute provides exceptions to compulsory education provisions, however, some courts have held that the plaintiff has the burden of showing that he comes within the exempt category.

In some states the burden of proof is shifting. The initial burden is on the state to show noncompliance with the compulsory attendance law. Once this has been established, the parents must show that their home schooling is at least equivalent to the instruction provided in the public schools. The burden might then be shifted back to the state to prove that the child is being educationally deprived.

It appeared that the home-schooling issue will remain an issue—at least in the near future—because it involves a number of complex legal problems. In all probability only a number of decisions by the Supreme Court over a period of years will establish comprehensive and definitive guidelines. This article, besides analyzing the legal considerations involved in the home-schooling alternative, has attempted to provide some guidelines and insights for public schools authorities to use until the Supreme Court specifically and comprehensively addresses the issue. ■

Due Process Before a Public Employee Is Dismissed: *Cleveland Board of Education v. Loudermill*

by Trudy A. Ennis

The Fifth and Fourteenth amendments to the United States Constitution prohibit the government from depriving a person of life, liberty, or property without due process of law. The United States Supreme Court has recognized that constitutionally protected property interests extend beyond actual ownership of tangible property.[1] Instead, many of today's property interests take the form of entitlements to benefits derived from the government.[2]

Under certain circumstances, the right to continued employment is a property right.[3] A tenured employee has a property interest in his employment, and an employee who has a contract for a certain term has an entitlement to his employment for that period.[4] Mutually explicit understandings between an employer and an employee may also create a property interest.[5] And, even though it is difficult to prove, an employee may have a property interest created by de facto tenure—that is, tenure implied by the employer's "words and conduct in the light of surrounding circumstances."[6] If the Court finds that the employee does have a property interest in his employment, it then determines what process is due before he can be terminated.[7]

In *Cleveland Board of Education v. Loudermill*,[8] the United States Supreme Court addressed the issue of "what pretermination process must be accorded a public employee who can be dismissed only for cause."[9] Even though the Court clearly established that a public employee who has a property interest in his employment must receive notice and a hearing before he may be dismissed, it left unanswered several other issues that will continue to evoke litigation. This article examines what the Court said, focuses on the immediate implications of the decision, and examines the unanswered questions and lower court responses to some of those questions since *Loudermill* was decided.

Facts of the Case

Two dismissed employees' cases had been combined on appeal. The Cleveland Board of Education hired Loudermill as a security guard. On his job application, he stated that he had never been convicted of a felony. When the board later reviewed his record, it discovered that he had been convicted of grand larceny. The board informed Loudermill by letter that he had been dismissed for dishonesty in completing the application. He had no opportunity to answer the charge or challenge his dismissal. Loudermill was a classified civil

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1. Board of Regents v. Roth, 408 U.S. 564, 571-72 (1972).

2. Goldberg v. Kelly, 397 U.S. 254, 262 n. 8 (1970) [quoting Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1966)].

3. Cleveland Bd. of Educ. v. Loudermill, _____ U.S. _____, _____, 105 S.Ct. 1487, 1489 (1985).

4. Board of Regents v. Roth, 408 U.S. 564, 576-77 (1972).

5. Perry v. Sindermann, 408 U.S. 593, 601 (1972).

6. *Id.* at 602.

7. Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

8. _____ U.S. _____, 105 S.Ct. 1487 (1985).

9. *Id.* at _____, 105 S.Ct. at 1489.

servant under Ohio Rev. Code § 124.11 who could be dismissed only for cause and, under Ohio Rev. Code § 124.34, if dismissed, had the right to an administrative review of the dismissal.

He appealed to the Cleveland Civil Service Commission, which appointed a referee and conducted a hearing. Loudermill claimed that he thought his larceny conviction was for a misdemeanor. Even though the referee recommended reinstatement, the full commission heard argument and upheld his dismissal. Loudermill alleged that Ohio Rev. Code § 124.34, with its right to administrative review, was unconstitutional because it did not give an employee an opportunity to respond to charges before dismissal, thus depriving him of property without due process.

The other dismissed employee, Donnelly, was a bus mechanic who was fired when he failed an eye examination. Donnelly ignored an offer to take another test and appealed to the Civil Service Commission. After a year's delay, the commission heard Donnelly's case and reinstated him without back pay. Donnelly made constitutional challenges similar to Loudermill's. He contended that dismissed employees were not required to exhaust administrative and state procedures before bringing their constitutional claims to federal court.

The Court's Analysis and Holding

The Court first decided whether Loudermill and Donnelly had a property right in continued employment, since there could be no constitutional claim without such a right. It stated that property interests are created by independent sources like state law, not by the Constitution. Loudermill and Donnelly were civil service employees who clearly had such a property interest because the relevant Ohio statute classified them as employees who could be dismissed only for cause.

The Court then analyzed the board's argument that the process due an individual deprived of this property right was limited because the legislature, in the same statute that created the property right, also specified grounds and procedures for its termination. The Court emphasized that even though the governmental entity decides whether to confer a property interest in public employment, once that entitlement is created it is the Constitution—not statutes, ordinances, or regulations—that determines what process is due before the employee may be deprived of that entitlement.

After stating that the Constitution determines what process is due, the Court canvassed past decisions to determine what procedures the employer must follow when it dismisses a public employee. The essential principle of due process is that notice and an opportunity for a hearing "appropriate to the nature of the case" must precede a deprivation of life, liberty, or property.[10] In the context of property, the "root requirement" is that this hearing precede the deprivation of any "significant property interest."[11] Thus the Court held that "some kind of hearing" must be provided before an employee who has a constitutionally protected property interest in his employment may be discharged.[12]

In reaching that conclusion, the Court relied on cases in which it had held that a balancing test determines what process is due.[13] Weighing the employee's interest at stake, the risk of wrongful deprivation, and the government's interest in administrative efficiency, the Court found that Loudermill and Donnelly had a right to a hearing before they were dismissed. In reaching that conclusion, the Court emphasized that the employee has a significant interest in retaining employment because of the severe consequences of losing one's livelihood. Providing notice and an opportunity to respond does not unreasonably burden the public employer, the Court said. The employer shares the employee's interest in avoiding wrongful decisions because its interest is better served by keeping trained employees on the job than by unnecessarily forcing them onto welfare rolls.

The Court elaborated on why a hearing before discharge is necessary even when the facts are undisputed. One important factor is that a permissible dismissal may not be a necessary one, and "the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination. . . ."[14] The Court acknowledged one reality of human relationships: It is much more difficult to convince someone to change his mind after a decision has been made than to explain why the decision should not be made in the first place.

Even when it is unlikely that the employee will influence the decision, his right to an opportunity to respond to charges is not outweighed by the government's interest in immediate termination. The Court stated that if the employer "perceives a significant hazard in keeping the employee on the job," the appropriate action is to suspend with pay.[15]

Once the Court weighed the interests and saw that some kind of pretermination hearing is required, it qualified that

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10. *Id.* at _____, 105 S.Ct. at 1493.
11. *Id.*
12. *Id.*
13. *Id.* at _____, 105 S.Ct. at 1494 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)).
14. *Id.*
15. *Id.* at _____, 105 S.Ct. at 1495.

requirement by stating that such a hearing need not be elaborate: "The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."[16] Whenever state law provides full administrative procedures after dismissal, "the pretermination hearing need not definitively resolve" the matter.[17] Instead, "[i]t should be an initial check against mistaken decisions—essentially a determination of whether there are reasonable grounds to believe that the charges are true and [permit dismissal]."[18] The Court held that notice and an opportunity to respond were the only constitutional requirements before Loudermill and Donnelly could be dismissed. But it limited the holding by stating that these minimal pretermination requirements were coupled with requirements for the full postdeprivation procedures provided by Ohio law.

In general, a full evidentiary hearing is not required before dismissal, but it must be provided at some point after the termination. (N.C.G.S. 115C-325 provides an example of the elements of a full posttermination hearing. A tenured teacher who has been dismissed is entitled to an administrative hearing that includes the right to be represented by counsel, to present evidence and make arguments, and to cross-examine adverse witnesses. After the hearing, the teacher may appeal the decision to the superior court of the judicial district in which he was employed.)

Because due process requires that the posttermination hearing be at a "meaningful time," the *Loudermill* Court acknowledged that "[a]t some point, a delay in the posttermination hearing would become a constitutional violation."[19] In dismissing Loudermill's claim that a nine-month delay before a decision was made on his administrative appeal violated due process, the Court said that the period was not "unconstitutionally lengthy per se," and Loudermill had not alleged facts to establish that the hearing "was unreasonably prolonged."[20]

Immediate Significance

Governmental entities must provide notice and an opportunity for the employee to respond to the charges, either orally or in writing, before dismissing him. Footnote 7 in the *Loudermill* decision states that "[t]here are, of course, some situations in which a post-deprivation hearing will satisfy due process."[21] However, employers should not read footnote 7 as a loophole that provides them with a defense for not meeting the minimal due process requirements. The cases cited by the Court to support this proposition involved seizure of products that were potentially harmful to the consumer. In other contexts, the Court has repeatedly emphasized that only extraordinary circumstances or overriding governmental interests justify postponing the hearing until after the deprivation has occurred.[22] The Court has stated that "[no] later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process had already occurred. This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."[23]

The holding that failure to provide an opportunity to respond before a person with a property right in his employment is deprived of his job violates the Constitution may signal far-reaching financial consequences for the public employer. Under 42 U.S.C. § 1983, an individual may sue and recover damages from a public official who has violated his federal constitutional rights. However, the Supreme Court has held that officials who perform discretionary functions may claim qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[24] Since *Loudermill*, courts have consistently held that failure to provide notice and an opportunity to respond before dismissal violates clearly established constitutional rights, and officials responsible for the violation may not claim qualified immunity in order to escape liability. But if the employer can show that the discharge would have occurred even if constitutionally adequate procedures had been followed, the employee is entitled to only nominal damages for the violation of his rights unless he can prove actual injury resulting from the denial of due process.[25] However,

16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at _____, 105 S.Ct. at 1496.
20. *Id.*

21. *Id.* at _____, 105 S.Ct. at 1493.

22. Boddie v. Connecticut, 401 U.S. 371, 379 (1971). *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 582-83 (1975) (predeprivation notice and hearing required before students are suspended from school); Ewing v. Mytinger & Casselberry, 339 U.S. 594, 600 (1950) (multiple seizures of mislabeled vitamins do not require predeprivation notice and hearing).

23. Fuentes v. Shevin, 407 U.S. 800, 818 (1972).

24. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). For a full discussion of the subject, see Smith, *Qualified Immunity for Violations of Federal Rights--A Modification*, 15 SCHOOL L. BULL. 1 (January 1983).

25. Carey v. Piphus, 435 U.S. 247, 263-66 (1978); Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, 1265 (7th Cir. 1985); Salisbury v. Housing Authority, 615 F. Supp. 1433, 1444 (E.D. Ky. 1985); Hopkins v. City of Wilmington, 615 F. Supp. 1455, 1464-65 (D.C. Del. 1985).

the employee would be able to recover wages for the period between the denial of his due process rights and the adequate posttermination proceedings.[26]

Employers who violate an employee's due process rights may face economic consequences in addition to compensatory or nominal damages awarded under Section 1983. Section 1988 of 42 U.S.C. gives the court discretion to award reasonable attorney's fees to a prevailing party in any action or proceeding to enforce Section 1983.[27] The general rule is that a prevailing plaintiff should recover attorney's fees unless special circumstances make such an award unjustified.[28]

Defining "prevailing" party is easy if the court finds that the dismissed employee has been denied due process and that the discharge would not have occurred but for that procedural violation. Otherwise, establishing who is a prevailing party entitled to attorney's fees is not simple. The Supreme Court has held that a plaintiff may recover attorney's fees as a prevailing party if a Section 1983 suit has been settled by a consent decree.[29] The Fourth Circuit Court of Appeals has established a test for determining whether a plaintiff who has obtained some relief through settlement, rather than a trial decision, is a prevailing party under Section 1988.[30] Under that test, to qualify as a prevailing party (1) the plaintiff must have prevailed on a significant issue in the suit and achieved some of the benefits originally sought, and (2) the suit must have contributed significantly to achieving that benefit. Another significant question is whether an award of nominal damages qualifies the plaintiff as a prevailing party entitled to attorney's fees. The circuits have split on this issue, but the Fourth Circuit has held that a dismissed public employee may receive attorney's fees when only nominal damages are awarded for violations of due process rights.[31]

Prevailing defendants may also be able to recover attorney's fees, but they must satisfy a much higher standard than prevailing plaintiffs because (a) the purpose of Section 1988 is to encourage individuals to enforce their constitutional rights, and (b) requiring an unsuccessful plaintiff to pay the defendant's attorney's fees tends to defeat that purpose. Therefore, the Supreme Court has held that a prevailing defendant may recover attorney's fees only if the claim was frivolous, groundless, or unreasonable or if the plaintiff continued the suit after it clearly became frivolous or unreasonable.[32] Under this standard, the North Carolina Court of Appeals has awarded attorney's fees to a school superintendent and a board of education in a suit brought by a dismissed employee.[33]

Even though *Loudermill* means that public employers will be liable for violation of an employee's due process rights, the employee will not be able to establish such a violation by proving that the employer did not follow statutory and administrative procedures. Because the Constitution governs due process, since the *Loudermill* decision was made lower courts have not allowed an employee to establish a due process violation on proof that a governmental entity violated its own procedures.[34] Due process has not been violated if the employer provides the procedures that are constitutionally required. The Fourth Circuit Court of Appeals held that a tenured teacher who received notice and a hearing was not denied due process when the local board of education failed to follow its own procedures.[35] The teacher was dismissed on the basis of the principal's evaluation of her performance. She claimed that her constitutional rights had been violated because she had received only two evaluation conferences even though local written policy required three. The court stated that enforcement of regulations like these must be accomplished through the state courts because they involve no federal constitutional rights.

Related Unresolved Issues about Dismissal Procedures

Employers should be alert to the fact that the minimum notice and hearing before deprivation of a property right is conditioned on the availability of a full postdeprivation hearing. The Eighth Circuit Court of Appeals remanded a case for consideration of whether pretermination notice and opportunity to respond were sufficient in light of the later proceedings.[36] The court thought this action was necessary

26. Hopkins v. City of Wilmington, 615 F. Supp. 1455, 1464-65 (D.C. Del. 1985).

27. For a full discussion of the subject, see Smith, *Attorney's Fees in Section 1983 Lawsuits*, 14 SCHOOL L. BULL. 1 (July 1982).

28. *Id.* at 2 [citing Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (announcing the standard later incorporated into the legislative history of the fees amendment).

29. Maher v. Gagne, 448 U.S. 122 (1980).

30. Bonnes v. Long, 559 F.2d 1316, 1319 (4th Cir. 1979).

31. Burt v. Abel, 585 F.2d 613, 618 (4th Cir. 1978).

32. Hughes v. Rowe, 449 U.S. 5, 14-15 (1980) (per curiam) (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)).

33. Miller v. Henderson, 71 N.C. App. 366, 322 S.E.2d 594 (1984).

34. *See, e.g.*, Levitt v. University of Texas at El Paso, 759 F.2d 1224 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 599 (1985), *reh'g denied*, 106 S.Ct. 1290 (1986).

35. Goodrich v. Newport News School Bd., 743 F.2d 225 (4th Cir. 1984).

36. Stermetz v. Harper, 763 F.2d 366 (8th Cir. 1985).

because of the Supreme Court's statement in *Loudermill* that "[t]he formality and procedural requisites for the [pretermination] hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."[37] If the pretermination hearing is the only one afforded the employee, it must be the full evidentiary type.[38]

Loudermill clearly establishes one constitutional requirement of due process: If full posttermination procedures are available to the employee, the employer must provide at least notice and an opportunity to respond at the pretermination stage. Employers should remember that these procedures are the minimum and more may be required. In *Loudermill* the dismissed employees were not disputing the facts. If the facts had been in dispute, would the Court have required more than the minimal predeprivation hearing? The issue is not resolved, but at least two justices would require more than pretermination notice and an informal opportunity to respond if the facts are disputed. The *Loudermill* opinion indicated that Justice Marshall and Justice Brennan differed in their predictions of what the Court might require of due process if the facts were disputed.

Justice Marshall argued that more due process protection is required "whenever there are substantial disputes in testimonial evidence."[39] He wrote separately because he read the majority opinion as suggesting that no additional due process requirements would be imposed even if the facts were disputed. Justice Brennan, on the other hand, wrote an extensive analysis of his reasons for believing that the question was unresolved:

> The Court acknowledges that what the Constitution requires prior to discharge, in general terms, is pretermination procedures sufficient to provide "an initial check against mistaken decisions of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action" [citation omitted]. When factual disputes are involved, therefore, an employee may deserve a fair opportunity before discharge to produce contrary records or testimony, or even to confront an accuser in front of the decisionmaker.[40]

Even though the Court did not resolve the issue of what additional procedures might be required at the pretermination stage if factual disputes exist, the employer should keep in mind that notice and a brief opportunity to respond might not be sufficient to satisfy due process in such a case.

Another issue faced by lower courts since *Loudermill* is whether the employee's rights have been violated because the decision-maker was biased. At a pretermination hearing, due process is not violated if the official who makes the charges is also the one who decides whether to dismiss the employee.[41] Even if the official who makes the initial dismissal is also the final decision-maker after the employee has received a full posttermination hearing, the dismissed employee must overcome the presumption that the administrator was fair.[42] To overcome this presumption he or she would have to show bias or prejudgment.[43] Thus, a school superintendent could constitutionally make the initial decision to dismiss a teacher and also be involved in the final decision after the teacher received a posttermination hearing.

Only a few courts have held that the presence of a biased decision-maker denied an employee due process in an otherwise adequate proceeding. However, it is possible for an employee to overcome the presumption of impartiality. A Kentucky district court considered four factors in determining whether a decision-making board or official had a disqualifying personal bias:[44]

(1) Was the decision-maker's role in initiating charges merely a procedural step, or did it imply a closed mind on the issue of guilt?
(2) Were the facts disputed so that a possible lack of impartiality might create a serious risk of wrongful deprivation?
(3) Did the decision-maker have a personal interest, relating to either money or prestige, in seeing that the termination be upheld?
(4) Was there personal animosity between the employee and the decision-maker?

Finding that one of these elements existed does not necessarily mean that the decision-maker was biased or that the employee's due process rights were violated. Instead, the answers to these four questions should be balanced to determine whether the employee has rebutted the presumption of fairness.

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37. *Id.* at 368 (quoting *Loudermill* at _____, 105 S.Ct. at 1495).
38. Salisbury v. Housing Authority, 615 F. Supp. 1433, 1438 (E.D. Ky. 1985).
39. *Loudermill*, _____ U.S. at _____, 105 S. Ct. at 1497. (Marshall, J., concurring).
40. *Id.* at _____, 105 S.Ct. at 1499 (Brennan, J., concurring in part and dissenting in part).
41. DeSarno v. Department of Commerce, 761 F.2d 657, 660 (Fed. Cir. 1985); Brasslett v. Cota, 761 F.2d 827, 837 (1st Cir. 1985).
43. Brasslett v. Cota, 761 F.2d 827, 837 (1st Cir. 1985).
44. Salisbury v. Housing Authority, 615 F. Supp. 1433, 1441 (E.D. Ky. 1985).

Required Pretermination Notice and Opportunity to Respond in Related Employment Decisions

Employers should consider *Loudermill* when they make other types of employment decisions because it has implications for several property interests related to employment. In a variety of situations, lower federal courts have applied the pretermination requirements of notice and opportunity to respond and held that Section 1983 relief is available to the deprived employee in the following situations.

Suspension Without Pay. Suspension without pay has been addressed by lower courts since *Loudermill*. If suspension without pay deprives an employee of a significant property interest (and it probably does), then public employers should not interpret the Supreme Court's holding in *Parratt v. Taylor*[45] as authorizing such suspensions without giving the employee an opportunity to respond. In *Parratt* the Court held that postdeprivation hearings may be adequate to provide all process due in cases in which a pretermination hearing is "impracticable" or "impossible."[46] As one lower court has noted, the *Parratt* holding is extremely limited and does not apply to situations in which notice and an opportunity to respond are not impracticable or impossible, as when a teacher is suspended without pay.[47] Another court held that suspension without pay violated a policeman's clearly established constitutional rights because he had been given no predeprivation opportunity to respond to the drug charges that resulted in his suspension and ultimate dismissal.[48]

The Court's statement in *Loudermill* that an employer should suspend with pay an employee who presents a potential hazard is further proof that employers must at least give the employee an opportunity to present his side of the story before suspending him without pay. Thus statutes like N.C.G.S. 115C-325(f) may be unconstitutional. That statute provides:

> Suspension without Pay.—If a superintendent believes that cause exists for dismissing a probationary or career teacher for any reason specified in G.S. 115C-325(e)(1)a. through 115C-325(e)(1)j. and that immediate suspension of the teacher is necessary, the superintendent may suspend him without pay and without giving notice and a hearing. Within five days after a suspension under this paragraph, the superintendent shall initiate a dismissal as provided in this section. If it is finally determined that no grounds for dismissal exist, the teacher shall be reinstated immediately and shall be paid for the period of suspension.

If a superintendent wishes to suspend a teacher, he should give the teacher presuspension notice and an informal hearing. If that is impossible, he should suspend the teacher with pay pending an informal hearing. After that hearing, he may then constitutionally suspend without pay.

Temporary Suspension Without Pay As a Disciplinary Action. Two courts have reached different conclusions about this issue. A Missouri district court stated that the right to continued employment includes the right to office and "emoluments" such as rank and compensation.[49] Because a three-day suspension caused the loss of these "emoluments" and compensation, the employee was entitled to due process before the suspension, which represented a deprivation of this property interest. Balancing the rights of the governmental employer and the rights of the employee, the court concluded that an employee may not be suspended without pay unless he receives notice of charges and an opportunity to respond. It said that the "suspension was not *de minimus* because [the employee] was deprived of compensation for the period of the suspension."[50] Because the dismissed employee was a policeman, the court qualified its holding by stating that if his continued presence on the job created a threat to effective law enforcement, he might be suspended immediately but notice and an opportunity to respond should follow as soon as possible. It is important to note that the court would allow immediate suspension under pressing circumstances, but it did not say that pay might be immediately suspended also.

On the other hand, the Sixth Circuit Court of Appeals held that employees who were disciplined but not discharged were not deprived on any property interest.[51] In a footnote, the court said that a two-day suspension without pay constituted a theoretical violation of a property interest but the deprivation was *de minimus* and undeserving of due process considerations.[52]

45. 451 U.S. 527 (1981).

46. *Id.* at 540-42.

47. Stachura v. Truszkowski, 763 F.2d 211 (6th Cir. 1985), *cert. granted in part*, 106 S.Ct. 245 (1985).

48. Hopkins v. City of Wilmington, 615 F. Supp. 1455 (D.C. Del. 1985).

49. Click v. Board of Police Comm'rs, 609 F. Supp. 1199 (D.C. Mo. 1985).

50. *Id.* at 1204.

51. Carter v. Western Reserve Psychiatric Habilitation Center, 767 F.2d 270 (6th Cir. 1985).

52. *Id.* at 272 n. 1.

Demotion. A federal district court in the State of Washington held that an employee who is to be demoted and will have full postdeprivation proceedings is entitled to only the *Loudermill* guarantees of notice and opportunity to respond before the demotion.[53]

Right to a Similar Position. A New York district court evaluated the due process claim of an employee whose position was abolished.[54] The employee alleged that he should not have been terminated without a hearing to determine whether he had an entitlement to a newly created position. The court held that the employee had been deprived of due process because the employer knew or should have known that the two positions might well have been similar enough to give the employee an entitlement to the new job. Therefore, the employee was entitled to a pretermination hearing on the similarity of the two positions to determine whether he had a property right in the new post.

Information in a Personnel File. An Alabama federal district court held that an employee's due process rights were violated when the final decision-maker relied on certain information in the employee's personnel file to conclude that he should be dismissed.[55] The employee had been told that this information would not be considered and was specifically denied an opportunity to respond to the information at his pretermination hearing. The court applied *Loudermill* and concluded that the employee's constitutional rights had been violated because he should have been given notice that the information would be considered by the final decision-maker and an opportunity to respond to that information before it was used in deciding to dismiss him.

Resignations. If an employee tenders his resignation, to take effect later, the employer still may not dismiss him without providing pretermination notice and a hearing. A Delaware district court held that employers who do so violate clearly established rights because resigning and being dismissed are not synonymous.[56]

Application for Employment. The Third Circuit Court of Appeals held that a teacher who sought employment in a school district had a property interest in her position on an eligibility list, and removal from that list without predeprivation notice and an opportunity to respond to the charges that kept her name off the list violated due process.[57] The court analyzed this case under *Loudermill* because only teachers whose names appeared on the list could be considered for employment.

Docking Paychecks. A post-*Loudermill* unpublished Fourth Circuit Court of Appeals opinion involved teachers who had been docked one day's pay because of allegations that they had abused sick-leave rights.[58] The court of appeals affirmed the district court's dismissal for failure to state a due process cause of action under Section 1983. It did not decide whether one day's pay amounted to a significant property interest. Instead, assuming without deciding that the loss of ones day's pay amounted to a deprivation of property, the court held that, regardless of how wrongful withholding one day's pay might have been, "a final deprivation of property has not occurred because plaintiffs failed to pursue the post-deprivation remedies available under state law."[59]

Employers should not base employment-related decisions on this holding, because the rationale is probably incorrect in light of *Loudermill's* requirement of notice and an opportunity to respond before the government may deprive an individual of any "significant" property interest. If an employee alleges that his due process rights have been violated, the crucial initial question is whether one day's pay is a significant property interest, not whether he has pursued available state remedies.

Under the analysis of "significant" property interest, supervisors, principals, and teachers in North Carolina might have a due process claim if the local board of education decided to use two provisions of the North Carolina General Statutes without providing notice and an opportunity to respond. G.S. 115C-285(c) reads: "The board of education may withhold the salary of any supervisor or principal who delays or refuses to render such reports as are required by law, but when the reports are delivered in accordance with law, the salary shall be paid forthwith." G.S. 115C-303(b) makes the same statement about teachers. Clearly, a local school board has authority to require its personnel to perform their duties in order to be paid. But *Loudermill* and other decisions cast

53. Williams v. City of Seattle, 607 F. Supp. 714 (W.D. Wash. 1985).
54. DeSimone v. Board of Educ., 612 F. Supp. 1568 (E.D.N.Y. 1985).
55. Davis v. Alabama State Univ., 613 F. Supp. 134 (M.D. Ala. 1985).
56. Meding v. Hurd, 607 F. Supp. 1088 (D.C. Del. 1985).
57. Stana v. School District of Pittsburg, 775 F.2d 122 (3d Cir. 1985).
58. Board of Educ. of Prince George's County, Maryland, No. 84-2279, slip op. (4th Cir. May 10, 1985) (per curiam).
59. *Id.* at 3.

doubt on whether the board may withhold salary unless it provides the employee with notice that the action is pending and gives him an opportunity to respond.

Summary

Loudermill sends a clear message to public employers: Whenever an official or governmental entity acting in a supervisiory position decides to dismiss an employee, the employee is entitled to notice and an opportunity to respond before the dismissal. The notice and response may be either oral or written. If a full hearing is afforded after the dismissal, that opportunity to respond may be very informal and very brief. The employer may dispense with this minimal predeprivation procedure only if it is impossible or impracticable. If the employee's continued presence on the job presents a clear danger or undermines the entity's function, the employer could suspend him immediately with pay until an opportunity to respond is provided.

Loudermill establishes the minimal pretermination constitutional requirements, but employers should keep in mind that failure to follow statutes and regulations may also provide the deprived employee with other claims, such as breach of contract. *Loudermill* simply defines constitutional minimums and should not be read as license to ignore the other procedures that states, municipalities, or other entities may provide to employees.

Employers must also remember to provide the dismissed employee due process throughout the termination procedure, not just at the pretermination stages. After *Loudermill* the Eleventh Circuit Court of Appeals held that an employee's rights were violated even though notice and an opportunity to respond were provided before he was dismissed.[60] The due process violation occurred through the employer's failure to provide an adequate posttermination hearing. Also, the Court's statement in *Loudermill* that "[a]t some point, a delay in the post-deprivation hearing would become a constitutional violation" indicates that a dismissed employee might be able to establish a constitutional violation on the basis of specific allegations that the delay was too long and unjustified even though the posttermination hearing was otherwise adequate.

Finally, employers must recognize the potential implications of *Loudermill* when they make other employment-related decisions. It may be that requirements of notice and an opportunity for the employee to respond also apply to decisions other than dismissal. ■

60. Kelly v. Smith, 764 F.2d 1412 (11th Cir. 1985).

Book Removals from School Libraries and Students' First Amendment Rights

by Timothy L. Coggins

During the 1970s and 1980s the federal courts struggled with whether removing books from school libraries violates students' First Amendment rights. In six cases with essentially the same facts, the courts split evenly on this issue.[1] In 1982 the United States Supreme Court addressed the matter in *Board of Education, Island Trees Union Free School District, No. 26 v. Pico*.[2]

This article will present the facts of *Pico*, discuss the school board's authority to transmit community values through the school curriculums, and describe students' First Amendment rights, including the right to receive information and the right to know. Then it will analyze the *Pico* decision to point out the balancing of interests necessary in book-removal cases; finally, it will make some recommendations to school officials and boards who are contemplating book removals.

Background

The Facts of *Pico*. In September 1975, three members of the Board of Education of the Island Trees Union Free School District attended a workshop where they obtained a collection of excerpts from "objectionable books." Eleven of these books were found in either the libraries of the school district or on reading lists for students.[3] Rather than fully review those eleven books themselves, the board reviewed the excerpts. Some of the passages that the board examined appear below. From *A Hero Ain't Nothing But a Sandwich*, the board studied the following passages: "The hell with the junkie, the wino, the capitalist, the welfare checks, the world . . . yeah, and fuck you too!"[4] And "They can have back the spread and curtains, I'm too old for them fuckin' bunnies anyway."[5]

Many of the other excerpts discussed sex. *Go Ask Alice* was challenged for the following two passages: "I wonder

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1. President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir. 1972); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Bicknell v. Vergennes Union High School Bd. of Directors, 638 F.2d 438 (2d Cir. 1980). For a summary of the *Zykan* decision, see *School Law Bulletin* 19-20 (April 1981). In *Zykan*, the books considered were a textbook, *Growing Up Female in America*, *Go Ask Alice*, *The Stepford Wives*, and *The Bell Jar*. Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979). See *School Law Bulletin* (Jan. 1977), 14, for a summary of the *Minarcini* decision. The books involved in *Minarcini—God Bless You, Mr. Rosewater* and *Catch 22*—were removed because they used four-letter words and fully described sexual acts.

2. 457 U.S. 853 (1982).

3. Kurt Vonnegut, *Slaughter House Five* (New York: Dell Publishing Co., 1971); Desmond Morris, *The Naked Ape* (New York: Dell Publishing Co., 1969); Piri Thomas, *Down These Mean Streets* (New York: Knopf, 1967); Langston Hughes, *Best Stories by Negro Writers* (Boston: Little, Brown, 1967); *Go Ask Alice* (Englewood Cliffs: Prentice Hall, 1971); Oliver Lafarge, *Laughing Boy* (Boston: Houghton Mifflin, 1957); Richard Wright, *Black Boy* (New York: Harper and Row, 1966); Alice Childress, *A Hero Ain't Nothing But a Sandwich* (New York: Coward, McCann & Geoghegan, 1973); Eldridge Cleaver, *Soul on Ice* (New York: McGraw-Hill, 1967); Jerome Archer, *A Reader for Writers* (New York: McGraw-Hill, 1962); Bernard Malamud, *The Fixer* (New York: Farrar, Straus & Giroux, 1966).

4. Childress, *A Hero Ain't Nothing But a Sandwich*, pp. 64-65.

5. *Ibid.*, pp. 75-76.

if sex without acid could be so exciting, so wonderful, so indescribable. I always thought it just took a minute, or that it would be like dogs mating."[6] And "Chris and I walked into Richie and Ted's apartment to find the bastards making love to each other . . . low class queer."[7]

A clinical discussion of sexual intercourse was reproduced from *The Naked Ape:*

> Also, the frontal approach provides the maximum possibility for stimulation of the female's clitoris during the pelvic thrusting of the male. It is true that it will be passively stimulated by the pulling effect of the male's thrust, regardless of his body position in relation to the female, but in a face-to-face mating there will in addition be the direct rhythmic pressure of the male's pubic region on the clitoral area, and this will considerably heighten the stimulation.[8]

From Kurt Vonnegut's *Slaughter House Five* the board reviewed the following passage: "He had a prophylactic kit containing two tough condoms 'for the prevention of disease only.' He had a dirty picture of a woman attempting sexual intercourse with a shetland pony."[9]

Passages alleged to be anti-Christian were also taken from Vonnegut's book.

> But the Gospels actually taught this: Before you kill somebody, make absolutely sure he isn't well connected. The flaw in the Christ stories, said the visitor from outer space, was that Christ who didn't look like much, was actually the son of the Most Powerful Being in the Universe . . . . Jesus really WAS a nobody, and a pain in the neck to a lot of people with more connections than he had.[10]

After reviewing these passages and excerpts from the seven other books, the board directed the principals of the district's schools to remove the books from the libraries. A controversy over the school board's actions ensued, but eventually nine books were removed, one book was returned to the library shelves, and parental permission was required before a student could check out one book.

Several junior high and high school students, including Steven Pico, sued in federal district court under the United States Code, Title 42, section 1983.[11] The students alleged that the board's actions—taken because the board's social, political, and moral tastes had been offended—denied the students their free-speech rights under the First Amendment of the United States Constitution.[12] The court granted summary judgment for the board, concluding that the board acted on its conservative education philosophy and on its belief that the books were irrelevant, vulgar, and immoral and therefore were educationally unsuitable.[13] The Court of Appeals for the Second Circuit reversed the district court's decision, holding that there were issues of material fact concerning the school board's motivations in ordering the books removed. The appeals court concluded that the students had a right to persuade the court that the motivations were simply pretexts for the board's desire to suppress ideas and speech.[14] The United States Supreme Court granted certiorari.

The School Board's Authority. Courts have been reluctant to intervene in actions by local boards of education and school officials because of the related doctrines of in loco parentis and indoctrination. Other courts have relied on the elected-official presumption to support the decisions of school boards.

The in loco parentis doctrine stipulates that school officials and boards stand in the place of parents and should therefore exercise parental authority to direct students' academic, moral, and intellectual development and to control their behavior.[15]

The second basis of support for school boards' actions is the indoctrination theory, which states that schools perform certain socialization and indoctrination functions. Local school boards therefore must be given broad discretion to shape the minds of the students to accomplish this socialization goal. The Second Circuit Court of Appeals adopted this view in *James v. Board of Education*, concluding that the principal function of public education is indoctrinative—to transmit basic values of the community to students.[16] The

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6. *Go Ask Alice*, p. 31.
7. *Ibid.*, 47.
8. Morris, *The Naked Ape*, pp. 73-74.
9. Vonnegut, *Slaughter House Five*, p. 34.
10. *Ibid.*, pp. 94-95.
11. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . shall be liable to the party injured in an action at law, suit in equity" 42 U.S.C. § 1983 (1982).
12. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. *See also* Gitlow v. New York, 268 U.S. 652 (1925), which expressly holds that the First Amendment prohibitions against infringement of free speech apply to the states through the due process clause of the Fourteenth Amendment.
13. Pico v. Board of Educ., Island Trees Union Free School Dist., 474 F. Supp. 387 (E.D.N.Y. 1979), *rev'd*, 638 F.2d 404 (2d Cir. 1980), *aff'd*, 457 U.S. 853 (1982).
14. *Id.* For a summary of the court of appeals decision, see *School Law Bulletin* (April 1981), 18-19. The Island Trees Board of Education ordered the removal because the books were "anti-American, anti-Christian, anti-Semetic [sic], and just plain filthy." Pico, 638 F.2d at 410.
15. Mawdsley, *In Loco Parentis: a Balancing of Interests*, 61 Ill. B.J. 638 (1973).
16. 461 F.2d 566 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

goal of indoctrination justifies control by the school board over most educational policies unless there is evidence that fundamental rights are being violated.

The final theory to support the broad discretion given to school boards in operating schools is reliance on the democratic process of elections: Parents and other community members elect most local school boards; therefore the persons elected reflect the general morals and thoughts of the community. Courts are reluctant to interfere with the decisions of elected school authorities if there is any reasonable educational basis for their decisions.[17]

None of these theories supports an abuse of discretion or sustains a violation of First Amendment rights. In 1943 the United States Supreme Court concluded that no official has "the right to prescribe what shall be orthodox in politics, nationalism, religion or matters of opinion."[18] The First Amendment is important in assuring individualism and cultural diversity in our society. Moreover, individual rights cannot be made subordinate to the views of the majority. In 1969 the Court used stronger language to support students' individual rights: "In our system, state-operated schools may not be enclaves of totalitarianism."[19] Whether in school or out of school, students are persons under the Constitution, with guarantees of certain fundamental rights that the state must respect. School officials do not, therefore, possess absolute authority over the students and their actions. Their authority must be exercised within limits in order not to violate fundamental rights.

The First Amendment Applied to Students. The First Amendment was first extended to students on a limited basis in 1923, when the United States Supreme Court struck down a state law that forbade the teaching of modern foreign languages to elementary-age children in public and private schools.[20] Twenty years later, the Court held that a student's right not to salute the flag was protected by the First Amendment.[21] In 1968, in declaring unconstitutional a state law that prohibited the teaching of Darwinism in any state-supported school, the Court affirmed the duty of the federal courts "to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry."[22]

Finally, in 1969 the Court held that a local school board had infringed on the free-speech rights of high school and junior high school students by suspending them from school for wearing black armbands in class as a protest against the government's policy in Vietnam. The Court concluded that "the authority . . . of school officials . . . must be exercised consistent with fundamental constitutional safeguards."[23] Students do not shed their rights to freedom of speech or expression at the schoolhouse door, the Court said. The school boards must discharge their important, delicate, and highly discretionary functions within the limits and constraints of the First Amendment.[24]

The Right to Information and the Right to Know. The right to receive information and the right to know have been supported in settings other than schools since 1943. In that year the Supreme Court invalidated an Ohio anti-soliciting ordinance, implying that the First Amendment protected a right to hear or receive information.[25] Later, in *Lamont v. Postmaster General*, the Court ruled that the right to receive information should be perceived as a fundamental personal right necessary to make the express guarantees of the First Amendment fully meaningful. It would be a barren marketplace that had only sellers and no buyers, Justice Brennan said in *Lamont*.[26] The Court extended First Amendment protection to commercial speech in 1976, arguing that freedom of speech presupposes a willing speaker. Moreover, the concept of a willing speaker is meaningless unless the protections of the First Amendment are afforded to the communication, to the *speaker, and to the potential recipients*. Freedom of speech is a reciprocal right that can be asserted by the recipient as well as by the sender.[27]

But the courts have not ruled consistently about the application of the right to receive information in the school environment. As mentioned previously, in a series of six cases the decisions were evenly split. Three federal courts concluded that removing books from the school library

17. East Hartford Educ. Ass'n v. Board of Educ., 562 F.2d 838 (2d Cir. 1977). See also Chief Justice Burger's dissent in Pico, 457 U.S. 853 (1982), which supports the view that parents have a voice in the administration of the schools. Justice Burger reasoned that a school board is truly "of the people and by the people," reflecting the constituency in a very real sense, and therefore could not exercise unchecked discretion. Parents can take steps to remove the elected officials. *Id.* at 891.

18. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

19. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 511 (1969).

20. Meyer v. Nebraska, 262 U.S. 390 (1923).

21. Barnette, 319 U.S. 624 (1943).

22. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

23. Tinker, 393 U.S. at 507.

24. *Id.* at 506.

25. Martin v. City of Struthers, 319 U.S. 141 (1943).

26. 381 U.S. 301, 308 (1965).

27. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976).

and/or the curriculum violates the First Amendment rights of students. Three other decisions concluded that the removal does not by itself constitute a First Amendment violation.[28] These six decisions recognize a basic assumption that is applied in the *Pico* decision: If First Amendment values are implicated, local officials who remove books from school libraries must demonstrate some substantial and legitimate government interests.[29] This balancing-of-interests test supports the decision in *Pico* and should control later decisions that involve students' rights.

Balancing the Rights of Students and the Duties of School Boards

The plurality opinion in *Pico*, written by Justice Brennan, extended students' rights to include the right to receive information under the First Amendment.[30] Though the opinion does not fully define the right and though it limits the application of the decision to school libraries, the Court does conclude that removing books from school libraries infringes on the rights of students. Such an action limits self-expression, restricts the development of students, and limits access to discussions, debates, and new information and ideas. Furthermore, the Court describes the right to receive ideas and information as an "inherent corollary" to the rights of free speech and a free press, both of which are explicitly guaranteed by the Constitution.[31]

Students need a guarantee of this right to receive information in order to prepare themselves to participate actively and effectively in society. They must be free to inquire, to study, to evaluate, and to gain maturity and understanding. The library, Justice Brennan maintains, is one of the most effective places for them to develop this maturity and understanding: "[T]he school library is the principal locus of such freedom."[32] It is the place where developing students can find the knowledge, materials, and ideas they need. The special circumstances of a school library make that environment "especially appropriate for the recognition of first amendment rights of students."[33]

In his concurring opinion, Justice Blackmun suggests that the principle of the case involves a narrower and more basic right than the right to receive information. The state may not suppress exposure to ideas for the sole purpose of isolating students from those ideas unless it has sufficiently compelling reasons. He argues that allowing a school board to engage in book removal cannot teach students to respect the diversity of ideas that is fundamental to the American system.[34] The school board must "be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[35]

But the Court does not flatly support the right to receive information as set forth by Justice Blackmun. Rather, it supports the concept that this right must be balanced with the duties of the school board.[36] To afford a means of determining whether the school board has abused its discretion and violated this right to receive information, the Court discusses the procedures school boards should use to review book-censorship issues and the motives of the school officials. School boards may not—on the sole grounds that they disagree with the moral, religious, or political views expressed in the books —remove materials from the school libraries. The removal, if it is to be supported by the courts, must be based on the board's duties to transmit community values by developing a school curriculum that reflects the community's philosophy and ideas.[37] Also, school officials may justify potential intrusions into the students' First Amendment rights by bringing into action some basis for exempting the removal from First Amendment requirements—for example, the protection of classroom order and the rights of others and the promotion of standards of civility and decency.

Determining whether the school officials have proper motives when they decide to remove a book is the difficult part of the balancing test. Any conclusion that the school officials ordered a book removed solely because they disagreed with the ideas expressed in it would support the view that First Amendment rights were violated. A conclusion that the book was removed because it ran counter to community values would support the board's decision. But

28. *See* notes 1 and 2, above.

29. Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 713 (D. Mass. 1978).

30. Pico, 457 U.S. at 867. The Court split sharply. Justice Brennan wrote the Court's opinion, joined by Justices Marshall and Stevens. Justices Blackmun and White wrote concurring opinions. Chief Justice Burger and Justices Rehnquist, Powell, and O'Connor dissented.

31. *Id.*

32. *Id.* at 868

33. *Id.*

34. *Id.* at 878-79.

35. Tinker, 393 U.S. at 509.

36. Pico, 457 U.S. at 869.

37. *Id.* at 864. The Court concluded that "[w]e are therefore in full agreement . . . that local school boards must be permitted to establish and apply their curriculum in such a way as to transmit community values, and that there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." *Id.*

how do we define "community values?" Furthermore, community values necessarily vary from one area of the country to another and from one part of the state to another. In various locations throughout the United States, the following library books have been challenged as not representing community values: *The Catcher in the Rye, The Lottery, One Day in the Life of Ivan Denisovich, The Sun Also Rises, Of Mice and Men, Huckleberry Finn, Doris Day: Her Own Story, The Diary of Anne Frank,* and Merriam-Webster's *New Collegiate Dictionary.*[38] These titles, which are required reading in many junior and senior high schools, have been removed from library shelves in some places because they were unsuitable and did not fit the local "community values" standard. *Newsweek* and *Ms.* magazine also have been challenged in various parts of the country.[39]

Although no definitive test to determine whether library materials support community values can be prescribed (and should not be) by the courts, it will be useful to understand the factors the court might consider in determining whether a local school board acted improperly.[40] A board must present substantial evidence in order to support or refute a charge of violating the First Amendment rights of students.The court will review the procedures and guidelines used by the officials. Procedures must be precise and sensitive enough to prevent any "chilling" (violation) of the students' rights. If removal procedures have been adopted, they must be followed if the school officials expect courts to support their decisions. (In *Pico* the district superintendent recommended that the board approach the removal decision through the established guidelines, but his advice was ignored.[41]) After reviewing the existing procedures, the board's failure to follow those procedures, and the evidence presented by the students, the Court concluded in *Pico* that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[42]

A Recommendation

Since *Pico* was decided in 1982, no other book-removal cases have been decided by the federal or North Carolina courts. *Pico* has been cited frequently in federal and state cases, most often to support the proposition that school boards have broad discretion in operating schools.[43] But the cases have also emphasized that the school officials' motives must be considered. If there is insufficient justification concerning the operation of the schools, the courts will not sustain an infringement of the students' First Amendment rights.[44]

After *Pico*, school officials and boards should take several steps. First, they should review whatever procedures and guidelines the district may have for dealing with removal cases. If there are no such procedures, they should be written, adopted, and strictly followed. Second, school officials must understand that the United States Supreme Court recognizes students' First Amendment rights, which include the right to receive information. Although the *Pico* opinion did not fully develop the right to receive information, this right does have support and should not be ignored. Finally, school boards must consider their motive when books are to be removed from the libraries in their school district. Any decisions to remove books purely for the purpose of suppressing ideas and isolating students from these ideas are open to review by the courts. The courts will support removal decisions that are based on a desire to preserve community values and philosophy, even if the philosophy is conservative, but they will overrule actions by school officials that ignore established guidelines and violate the students' First Amendment rights. ■

38. See *People for the American Way, Attacks on the Freedom To Learn: Lessons of Fear* (1982-83) (Washington: People for the American Way, 1983), pp. 9-23. The American Library Association, through its Intellectual Freedom Office in Chicago, also compiles a list of library materials that are challenged as being unsuitable for libraries and schools.

39. *Id.*

40. Courts could attempt to provide a broad test for the determination of community values, like the "contemporary community standards" test used in obscenity cases. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973), in which the Court sets out the actual test for obscenity:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work taken as a whole, lacks serious literary, artistic, political, or scientific value

Id. at 24. Since this test is applied to adults who are over eighteen years of age and are choosing what to read or view for themselves as individuals, the Court is unlikely to apply such a test in the school environment.

41. Pico, 457 U.S. at 874-75.

42. *Id.* at 871-72, quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

43. Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984); Fisher v. Fairbanks North Star Borough School Dist., 704 P.2d 213 (Alaska 1985); Solmitz v. Maine School Administrative Dist. No. 59, 495 A.2d 812 (Me. 1985).

44. *E.g.*, Fraser v. Bethel School Dist. No. 403, 755 F.2d 1356 (9th Cir. 1985), in which the court held that a school district must consider whether a student's actions substantially disrupted or materially interfered with the educational process before the school officials may discipline him.

The Duty to Report a Crime

by L. Poindexter Watts

School personnel frequently ask what legal obligation they may have to report criminal activity that they observe while performing their school duties. They cite unlawful drug possession as a common example of the crimes that worry them. Obviously there are crimes that every person should report, such as an attempt to bomb the schoolhouse, but in many other situations school authorities may prefer to handle student misconduct that is also technically a crime through school disciplinary channels without reporting to the police or other officials outside the school setting.

As often happens, the law is not open-and-shut in this regard, and the duty to report could vary with the circumstances. This article will first analyze the duty of citizens in general to report crime in various circumstances, and then it will discuss any specific statutory or common law provision that applies to teachers, principals, or other school personnel in those circumstances.

Misprision of Felony

To answer a question on school personnel's duty to report, the lawyer who is also a scholar would first investigate whether the common law concept of misprision[1] of felony, which would make failure to report a crime a crime in itself, has any application in North Carolina today.

An ancient North Carolina statute provides:

> All such parts of the common law as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, are hereby declared to be in full force within this State.[2]

Although many areas of the law are now governed by statutory codes, this statute preserves the common law we inherited from England to a surprising degree. The common law still plays an especially important part in shaping our criminal law. Many of the basic principles governing criminal liability are not in the statutes and must be sought in case law interpreting common law doctrine.

At the time the common law developed in England, there were no professional police, and law enforcement was considered a citizen's duty. Felonies were then all serious,[3]

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1. The term "misprision" derives from the old French *mespris*, a neglect or contempt. 4 W. Blackstone, Commentaries *119. When pronounced, the last two syllables of the word rhyme with "vision."

2. N.C. Gen. Stat. § 4-1 (1981).

3. Scholars disagree as to the list of "pure" common law felonies, because statutes early began to codify and reshape the punishments for particular crimes—and the definition of a felony originally depended on the punishment. A felony was a crime (other than treason, a separate category) that occasioned at common law the forfeiture of lands and goods. R. Perkins & R. Boyce, Criminal Law 14 (3d ed. 1982). The crimes that the North Carolina courts have recognized as common law felonies include: murder, manslaughter, mayhem (or maim—

capital[4] crimes; any able-bodied man who was present when a felony was committed had the duty to arrest the felon, and anyone with knowledge of the crime had the duty to raise the hue and cry. This was done by calling out to neighbors to give chase and then informing a constable, who would organize a *posse comitatus*. Failure to raise the hue and cry was the misdemeanor of misprision of felony.[5]

Curiously, there appears to be no reported case in North Carolina of a prosecution for misprision of felony, and this absence of ratification strongly raises the question whether the crime is any longer part of our common law. The law has constantly shifted over the years, both ameliorating the penalties for the common law felonies and adding a large number of statutory felonies. Many of these statutory felonies are far less serious in their impact on society than the original common law felonies, and the appropriateness of the misprision concept to them can be questioned. Also, the growth of professional police forces reduces the need to draw on citizens in arresting[6] felons and manning the *posse comitatus*.[7]

In other states where the common law has been retained, the cases are mixed concerning retention of misprision of felony. In general, the older cases favored retention and later cases have rejected the continued vitality of the crime.[8] The most recent cases have all held that imposing criminal liability for the mere silence of a person not involved or under a special duty is not compatible with modern life.[9] This view is buttressed by the cases interpreting a federal misprision statute.[10] The federal courts read into that statute a requirement that there be some act of concealment of the crime; mere silence is not enough.[11] In a recent South Carolina case, the court did recognize the common law offense even though the offense had not been charged for a long time, but it defined misprision to require an affirmative act of concealment of the crime.[12]

Although no North Carolina appellate court has been required to decide the misprision issue squarely,[13] many opinions have announced the governing legal principles in cases in which bystanders were prosecuted for some apparent passive assistance rendered to the criminal. The rule has been constant:[14] mere bystanders may have a residual common law power to act to prevent a felony, but they are not rendered aiders and abettors of the principal of the crime by their silence or even by their tacit approval of the crime (if it is not communicated to the principal so as to embolden him in his criminal activity). In a recent restatement of this rule, the Supreme Court of North Carolina indicated that

"mayhem" was orginally pronounced the same as "maim"), rape, sodomy, larceny, robbery, burglary, arson, and suicide.

The successful suicide could be tried in absentia, and on conviction his lands and goods could be forfeited to the crown. Our constitutional guarantee of the right to be present at trial prevents a trial in absentia today, but the Supreme Court of North Carolina did hold that *attempted* suicide was a common law misdemeanor, because suicide had been a common law felony. State v. Willis, 255 N.C. 473 (1961). Suicide has since been abolished as a crime. N.C. GEN. STAT. § 14-17.1 (1981).

A number of heavily punished early crimes were not considered common law crimes because they were under the jurisdiction of the church courts rather than the courts of the sovereign. Examples are perjury, forgery, bigamy, adultery, and crime against nature. (The common law felony of sodomy covered only anal intercourse and intercourse with animals.)

4. At an early stage in its development, the common law began to limit the death penalty for certain felonies by granting "benefit of clergy." Originally those under the church's jurisdiction were privileged not to be sentenced to death, but the concept was expanded over the years to apply to everyone. Larceny, for example, was divided into petit and grand larceny; petit larceny was a felony but was not punishable by death. The benefit of clergy also applied early to manslaughter. Eventually, all felonies in England were considered to have benefit of clergy unless a statute declared otherwise. PERKINS & BOYCE, *supra* note 3, at 14.

5. *Id.* at 570-72; W. LAFAVE & A. SCOTT, CRIMINAL LAW 526 (1972); 1 W. BLACKSTONE, COMMENTARIES *343-44; 4 *id.* *121, *293-94.

6. In North Carolina the common law right of the citizen's arrest has been abolished; instead, a private person is empowered to *detain* certain criminals until a law enforcement officer arrives. N.C. GEN. STAT. § 15A-404 (1983). The power to detain applies to felonies, breaches of the peace, crimes involving physical injury to another person, and crimes involving theft or destruction of property.

7. An officer in North Carolina may still empower a private person to arrest by requesting assistance in effecting arrests and preventing escapes from custody. N.C. GEN. STAT. § 15A-405 (1983). The statute is only permissive, however, and private persons no longer have a duty to render assistance to the officer.

8. Cases holding that the common law crime still exists include State v. Flynn, 217 A.2d 432 (R.I. 1966); State v. Biddle, 124 A. 804 (Del. 1923); State v. Wilson, 67 A. 533 (Vt. 1907). The latest case, *Flynn*, is possibly distinguishable, because it ruled on whether an indictment for misprision of felony was valid and did not pass directly on whether mere nondisclosure would constitute the crime.

9. Cases so holding include Pope v. State, 396 A.2d 1054 (Md. 1979); Mangeris v. Gordon, 580 P.2d 481 (Nev. 1978); Holland v. State, 302 So. 2d 806 (Fla. App. 1974); State v. Lefkowitz, 293 N.W. 642 (Mich. 1940). The *Pope* case contains an especially strong statement of the modern rule against making nondisclosure a crime. *See also* State v. Carson, 262 S.E.2d 918 (S.C. 1980).

10. 18 U.S.C. § 4 (1976).

11. *See, e.g.*, United States v. Davila, 698 F.2d 715 (5th Cir. 1983); United States v. Sampol, 636 F.2d 621, 653 (D.C. Cir. 1980); United States v. Hodges, 566 F.2d 674 (9th Cir. 1977).

12. State v. Carson, 262 S.E.2d 918 (S.C. 1980).

13. Misprision was featured collaterally in a few cases that have involved promises to pay money if a felony prosecution is dropped. Because this agreement constitutes the crime of compounding a felony, the courts have declared the promise void as a matter of public policy. However, in at least two of these civil cases, the Court mentioned in passing that "concealment of a felony is an indictable offense . . . ." Aycock v. Gill, 183 N.C. 271, 273 (1922); Thompson v. Whitman, 49 N.C. 47, 51 (1856). The two cases did not explain whether the "concealment" could consist of mere nondisclosure or would require some affirmative act.

14. *See, e.g.*, State v. Aycoth, 272 N.C. 48 (1967); State v. Hildreth, 31 N.C. 440 (1849).

it might be desirable to re-examine the rule and require that a bystander who sees a crime being committed take some action to aid a helpless victim—if the bystander could give the aid without endangering himself.[15] But this suggested change would resuscitate only the duty to prevent the felony in the special situations involving victims and would not affect the reporting requirement. A bill was introduced into the 1985 General Assembly to impose such a duty to aid a crime victim,[16] but it never got out of committee.

It can be argued that the court's statements as to culpability of bystanders should be discounted because they focus only on whether the bystander who does not act is guilty as an aider and abettor of the *principal* crime—usually a serious felony—rather than on whether he is guilty of the misprision misdemeanor. But the failure of our judges over the years to round out their discussions in those criminal cases with even a passing appellate court reference[17] to misprision is some evidence that the North Carolina would rule that the crime is not brought forward as part of our common law.

A North Carolina trial judge faced with a prosecution for misprision of felony based on simple nondisclosure would likely dismiss it, because the clear weight of authority in the United States is that this aspect of the crime is obsolete.[18] In addition, the police, magistrates, and prosecutors have no warrant forms or other materials that instruct them in how to charge and prove the offense of misprision of felony—which reduces the likelihood of a routinely brought prosecution, though there are imaginative and scholarly prosecutors who might initiate misprision prosecutions in some circumstances.

Obstruction of Justice

Another common law offense that must be examined is obstruction of justice. It is broad in its application, for "[u]nder the common law it was a misdemeanor to do any act which prevents, obstructs, impedes, or hinders the due course of public justice."[19] Despite this broad statement, certain limits apply when the duty to report is considered. If the misprision misdemeanor is obsolete, it surely follows that mere silence as to the occurrence of a crime could not be prosecuted as an obstruction of justice; that is, the same policy considerations that would prevent resuscitation of the misprision offense would prevent interpreting the obstruction offense so broadly as to cover failure to report.

There are, however, easily imaginable factual situations involving affirmative acts that could be more troublesome. Suppose, for example, a teacher discovered a student in a school restroom smoking a marijuana cigarette. The teacher took the cigarette, flushed it down the toilet, and began school disciplinary proceedings against the student. Simple possession of a small amount of marijuana is not a felony,[20] so the crime of misprision of felony is not in issue. But suppose an imaginative police officer learns of the incident and decides to charge the teacher with obstructing justice on the ground of destruction of evidence of a crime.

The statute making destruction of evidence a felony applies only to evidence in the hands of a law enforcement officer or an officer of the General Court of Justice.[21] However, it can be argued that the common law misdemeanor of obstruction of justice would cover the act of willful destruction of evidence that is not in the hands of an official. A modern North Carolina case recognized the existence of a broad common law offense of obstruction of justice that covers acts falling outside our patchwork of statutes dealing with various types of obstructions.[22] The case involved intimidation of a witness, but the texts on the common law have long recognized the multiple forms that obstruction of justice can take.[23] There is little doubt that a willful destruction or concealment of what a person knows will likely be evidence in a criminal case would be prosecutable as a common law misdemeanor—and the statutory felony would supersede the common law as to evidence already in official hands. Cases in other jurisdictions have expressly held that if the defendant knows when he destroys it that the evidence will be sought, it is no defense that no subpoena or search

15. State v. Walden, 306 N.C. 466 (1982).

16. H.B. 426, introduced by Representative Lancaster.

17. That is, in the criminal case discussions of aider-and-abettor liability. *But cf.* note 13, *supra*.

18. PERKINS & BOYCE, *supra* note 3, at 572-77; LAFAVE & SCOTT, *supra* note 5, at 526.

19. State v. Cassatly, 225 A.2d 141, 145 (N.J. Super., App. Div. 1966).

20. Possession of one-half ounce or less of marijuana is a minor misdemeanor for which probation must be granted if the judge imposes a sentence of imprisonment; possession of up to 1½ ounces of marijuana is a general misdemeanor; possession of over 1½ ounces is a felony. N.C. GEN. STAT. § 90-95(d)(4) (1985). A general misdemeanor is punishable by a fine, imprisonment up to two years, or both, in the discretion of the court. *Id.* § 14-3(a) (1981).

21. *Id.* § 14-221.1 (1981).

22. State v. Neely, 4 N.C. App. 475 (1969).

23. PERKINS & BOYCE, *supra note* 3, at 552-59, lists the three best-established types of obstruction of justice as (1) resisting or obstructing an officer, (2) tampering with witnesses, and (3) destroying or suppressing evidence.

warrant had yet been issued for it.[24] One legal encyclopedia stated:

> At common law, it constitutes an obstruction of justice to stifle, suppress, or destroy evidence knowing that it may be wanted in a judicial proceeding or is being sought by law enforcement officers . . . .[25]

The critical inquiry here is the teacher's state of mind and state of knowledge when he flushed the cigarette down the toilet. If the teacher knew that undercover narcotics agents were in the school and that the student would likely be caught on this or some other occasion if the marijuana was not destroyed, then he could well be guilty even though he had no clearly focused intent to frustrate a criminal proceeding. But if the chances that anyone would ever look for the marijuana as evidence were remote, the teacher's destruction of it probably would not be a criminal act.[26] Obviously, it would be wiser for the teacher to save the marijuana for evidence in any school disciplinary hearing and then allow school authorities to follow their routine procedures respecting the evidence once the disciplinary proceeding is over. Following routine procedures will generally prevent the prosecution from mustering proof of the requisite criminal intent in destruction-of-evidence cases.

Failure to Act When a Duty Has Been Imposed

Although the failure to act to prevent harm or the commission of a crime is different from the failure to report, it is nevertheless sufficiently related to deserve treatment here. Teachers and other school personnel given responsibility for the care of children need to know both when they are under a duty to act and what their liability may be if they fail to act. As noted above, the general rule today is that the uninvolved person has no duty to prevent a crime or aid a victim of crime.[27] This is not the case, however, when the person is involved in some way—either as an associate of the defendant or as a person on whom the law imposes a duty.[28] Among the numerous factual situations in which the law will impose liability for failure to act, two are especially akin to situations that teachers and other school personnel responsible for the care of students may encounter.

One common situation for imposing liability occurs when a person in possession of an automobile goes on a drinking spree with a friend and lets his friend, whom he knows to be also drunk, drive. The possession of the automobile carries with it a responsibility, and the possessor-passenger is liable for any impaired driving[29] or automobile manslaughter[30] that the driver may commit. Applying this sort of situation to the school setting, suppose that the teacher in charge of a field trip lets a student drive. If the student drives recklessly, the teacher in the car might be guilty of the principal offense of reckless driving if it occurred in a continuing fashion and the teacher had the opportunity to take control. The teacher's duty would spring from being in charge of the trip, and would not depend on whose vehicle was being used. A single, unforeseeable act of recklessness, though it may have disasterous results, would not be chargeable to the teacher.

Another situation is presented by the single mother who has a violent-tempered boyfriend. In one case[31] she stood by over a period of time, doing nothing, while the boyfriend severely assaulted the child. The law imposes a duty of care on the mother with respect to her child, and she can be prosecuted as a principal in the assault, manslaughter, or murder of her child—as the case may be. Her inaction, when the

24. People v. Fields, 105 Cal. App. 3d 341, 164 Cal. Rptr. 336 (1980); State v. Cassatly, 225 A.2d 141 (N.J. Super., App. Div. 1966); Commonwealth v. Russo, 111 A.2d 359 (Pa. Super. 1955). *See also* United States v. Fineman, 434 F. Supp. 197 (E.D. Pa. 1977), *aff'd*, 571 F.2d 572 (2d Cir.), *cert. denied*, 436 U.S. 945 (1978).

25. 67 C.J.S.2d, *Obstructing Justice* § 15 (1978).

26. For crimes of any consequence, the law usually requires the State to prove that the defendant had a guilty mind and committed some overt act. This concept is somewhat fuzzy, and the nature of the "*mens rea*" or "criminal intent" that may be required will vary depending on the elements of the crime under consideration. For a discussion of this difficult area of the law, see PERKINS & BOYCE, *supra* note 3, at 826-40.

27. See the text at note 14, *supra*.

28. The American Law Institute's Model Penal Code states the governing law in this regard in M.P.C. § 2.01(3):

> (3) Liability for the commission of an offense may not be based on an omission unaccompanied by action unless:
>
> (a) the omission is expressly made sufficient by the law defining the offense; or
>
> (b) a duty to perform the omitted act is otherwise imposed by law.

29. N.C. GEN. STAT. § 20-138.1 (1983).

30. Manslaughter is a common law felony and not defined by statute. The applicable penalties are set out in N.C. GEN. STAT. § 14-18 (1981): voluntary manslaughter is a Class F felony, and involuntary manslaughter is a Class H felony. Automobile manslaughter would be involuntary manslaughter.

Two other crimes may be chargeable in automobile homicides that result from impaired driving. (1) Second-degree murder may be charged if the life-endangering conduct is so inexcusable and so clearly likely to cause serious injury or death that it amounts to what the law defines as "malice." State v. Snyder, 311 N.C. 391 (1984); State v. Trott, 190 N.C. 674 (1925). (2) Under N.C. GEN. STAT. § 20-141.4(a1) (1983), a driver may be charged with felony death by vehicle. As a practical matter this crime is indistinguishable from involuntary manslaughter caused by an impaired driver, but it carries a lesser punishment; it is a Class I felony.

31. State v. Walden, 306 N.C. 466 (1982).

circumstances were such that she could have intervened to prevent the harm, was sufficient to make her an aider and abettor and thus as guilty as the boyfriend. Teachers undoubtedly have a similar, though somewhat lesser, duty of care as to students placed in their charge. If, for example, a teacher stood by while students violently hazed[32] a child, or deliberately left the room to facilitate the hazing, the teacher would be guilty (as an aider and abettor) of the hazing of or the assault on the child.[33]

Duty to Report Juvenile Abuse and Neglect

The closest thing that we have to a commonly used crime-reporting statute is the duty imposed on all persons to report cases of suspected juvenile abuse and neglect.[34]

The statutes dealing with juvenile abuse and neglect have been amended piecemeal over the years and are complex and difficult to interpret with certainty. Technically there is no requirement that members of the public report the *crime* of "child abuse"; instead, they must report the broader *conditions* of "juvenile abuse"[35] and "juvenile neglect"[36] (the terms are defined in the part of the General Statutes that includes juvenile law). The crimes of misdemeanor[37] and felony[38] child abuse apply to children under age sixteen; juvenile abuse and neglect are far broader in scope and apply to children under age eighteen.[39] For a detailed analysis of the statutes and their requirements, see the article by Mason and Watts entitled "The Duty of School Personnel to Report Suspected Abuse and Neglect" in the Spring 1986 issue of *School Law Bulletin*.

Because the issues and the text of the governing statutes are covered thoroughly in the article by Mason and Watts, this article will merely summarize the duties of school personnel in regard to abuse and neglect. A series of statements may suffice.

—The definitions of "juvenile abuse" and "juvenile neglect" do not cover all harm done to a child—only certain ones caused by parents, guardians, "custodians," and "caretakers."[40] Despite one lower-court prosecution,[41] most legal scholars believe that school personnel are not included in those key definitions.[42] Nevertheless, if anyone in the school system knows of a teacher or anyone else who has abused a child, the matter should surely be reported to the county director of social services and, in flagrant cases, directly to law enforcement authorities as well, even if the report is not technically required.

—The public's requirement is to report suspected juvenile abuse and neglect to the county director of social services, whose department is required to investigate.[43] The social services personnel are principally concerned with the welfare and custodial placement of the juvenile, but they also have a duty to report to the district attorney any *crimes* against children that their investigation reveals.[44] This means, though, that the public's crime-reporting duty is indirect in this instance.

—Anyone who makes a report of suspected juvenile abuse or neglect, cooperates with the social services investigation, testifies in any resulting judicial proceeding, or otherwise participates in a program authorized by the statutes governing juvenile abuse and neglect is immune from civil or criminal liability for acts done in good faith.[45]

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32. North Carolina has an anti-hazing statute that carries a misdemeanor penalty of a fine up to $500, imprisonment for up to six months, or both. N.C. GEN. STAT. § 14-35 (1981). If a student is convicted of this offense, the college or school must expel the student. *Id.* § 14-36.

33. If hazing results in serious injury, the prosecutor may well prefer to bring an aggravated-assault charge rather than a charge under the anti-hazing statute.

34. *Id.* § 7A-543.

35. Defined under the term "Abused Juveniles" by N.C. GEN. STAT. § 7A-517(1) (Supp. 1985).

36. Defined under the term "Neglected Juvenile" by N.C. GEN. STAT. § 7A-517(21) (Supp. 1985).

37. Misdemeanor child abuse is made an offense by N.C. GEN. STAT. § 14-318.2 (1981).

38. Felony child abuse is made an offense by N.C. GEN. STAT. § 14-318.4 (1981 and Supp. 1985).

39. North Carolina has a two-level definition of "juvenile." For purposes of prosecuting a child for a crime or determining whether the child is delinquent or undisciplined, the juvenile age is under 16. For all other purposes—including the status of the abused or neglected juvenile—the definition is "[a]ny person who has not reached his eighteenth birthday and is not married, emancipated, or a member of the armed services of the United States." N.C. GEN. STAT. § 7A-517(20) (Supp. 1985).

40. The definition of "abused juveniles" speaks in terms of harmful acts to a child committed or permitted by a "parent or other person responsible for his care . . ." N.C. GEN. STAT. § 7A-517(1) (Supp. 1985). The definition of "neglected juvenile" uses the phrase "parent, guardian, custodian, or caretaker . . ." *Id.* § 7A-517(21). The felony and misdemeanor child abuse statutes use the phrase "parent or any other person providing care to or supervision of . . . [the] child . . ." N.C. GEN. STAT. §§ 14-318.2(a), -318.4(a) (1981 & Supp. 1985). These phrases should probably all be defined to mean the same thing; this point is discussed in the Mason and Watts article cited in the text. In considering these phrases, it is important also to note the definition of "caretaker" in N.C. GEN. STAT. § 7A-517(5) (Supp. 1985).

41. State v. Freitag (Wake County District Court, January 31, 1986).

42. *See, e.g.*, N.C. Att'y Gen., letter to Mr. David A. Noland, Director, Jackson County Department of Social Services, July 14, 1981 (unpublished). Portions of this letter are quoted in the article by Mason and Watts.

43. N.C. GEN. STAT. §§ 7A-543, -544 (1981, Supp. 1985).

44. *Id.* § 7A-545 (Supp. 1985).

45. *Id.* § 7A-550 (1981).

—The General Statutes chapter on school law contains a specific statute that requires school personnel to report suspected juvenile abuse and neglect,[46] but the duty imposed on them is no different from and no broader than the duty placed on the general public.

A companion statute states that information given to a school counselor may be "privileged,"[47] and the referred-to statute on the school counselor privilege provides an in-court privilege against the counselor's being compelled to testify to confidential information.[48] That privilege may be waived by the child who confided, or it may be overridden by the judge in the interests of justice. The legislative history in regard to reporting of juvenile abuse and neglect makes it clear that school counselors—like everyone else—would be required to report to the county director of social services all cases of suspected abuse or neglect.[49]

—The statute requiring reporting of suspected juvenile abuse or neglect does not state any penalty for its violation. However, common law principles,[50] treated in the Mason and Watts article cited above, would suggest that failure to report suspected juvenile abuse or neglect is a general misdemeanor.[51]

Duty of State Employees to Report Crimes Involving State Property

North Carolina law (G.S. 114-15.1) imposes a duty on all state employees to report violations of criminal statutes involving misuse of state property to the State Bureau of Investigation. The first question to be answered is what types of educational personnel are state employees. Employees of the University of North Carolina clearly are state employees, but local employees of the community colleges are not.[52] Although public school teachers are paid according to a schedule set by the state and nearly all of them are paid with state funds, they are nevertheless hired by the local school board. Thus it is not clear whether public school teachers should be considered to be state employees. The Attorney General has usually advised that teachers are state employees because they are involved with a state program funded with state money.[53] This means that most public school personnel as well as employees of state universities are affected by the reporting statute applicable to state employees. The statute provides:

> **§ 114-15.1. Department heads to report possible violations of criminal statutes involving misuse of State property to State Bureau of Investigation.**
>
> Any person employed by the State of North Carolina, its agencies or institutions, who receives any information or evidence of an attempted arson, or arson, damage of, theft from, or theft of, or embezzlement from, or embezzlement of, or misuse of, any state-owned personal property, buildings or other real property, shall as soon as possible, but not later than three days from receipt of the information or evidence, report such information or evidence to his immediate supervisor, who shall in turn report such information or evidence to the head of the respective department, agency, or institution. The head of any department, agency, or institution receiving such information or evidence shall, within a reasonable time but no later than 10 days from receipt thereof, report such information in writing to the Director of the State Bureau of Investigation.
>
> . . . .[54]

The concluding (omitted) paragraphs of the statute (a) direct that the SBI investigate if appropriate; (b) require state employees to cooperate in any investigation; and (c) require the SBI to report violations of criminal statutes uncovered to the district attorney.

Although the statute is badly drafted, in essence it requires any state employee who has "information or evidence" of a crime involving state property to report it to his immediate supervisor as soon as possible. The statute then sets an outside limit of three days; the employee would be violating the statute if he unreasonably delayed within the three-day period before reporting when he could have reported sooner. The immediate supervisor must pass the report about the information or evidence along to the head

46. *Id.* § 115C-400 (1983).

47. *Id.* § 115C-401 (1983).

48. *Id.* § 8-53.4 (Supp. 1985).

49. The statutes governing the reporting of juvenile abuse and neglect expressly provided that two of the longer-established privileges would not provide a basis for not complying with the reporting requirements; the two privileges are the physician-patient privilege and the husband-wife privilege. *Id.* § 7A-551 (1981); *id.* §§ 8-53.1, -57.1 (1981).

50. See text at note 55, *infra*.

51. A general misdemeanor is punishable by a fine, imprisonment up to two years, or both, in the discretion of the court. *Id.* § 14-3(a) (1981).

52. 44 N.C. Att'y Gen. 315 (1975).

53. Telephone interview with Edwin Speas, Jr., Special Deputy Attorney General, N.C. Department of Justice (June 17, 1986). Speas said he advises all local school employees to assume that G.S. 114-15.1 applies when the property involved is state property or has been purchased in part with state funds. For two Supreme Court decisions that suggest that local school boards should be considered administrative agencies of the state, *see* Harris v. Board of Comm'rs, 274 N.C. 343 (1968), and Frazier v. Guilford County, 194 N.C. 49 (1927).

54. N.C. Gen. Stat. § 114-15.1 (1983).

of the department, agency, or institution; no time limit is set, but the as-soon-as-possible standard probably applies. A supervisor would undoubtedly be subject to disciplinary action at the very least if he delayed unreasonably. These reports can be oral, but they should be confirmed in writing and dated so that compliance with the statute can be demonstrated. The head of the department, agency, or institution would probably telephone the SBI immediately, but the statute requires—for the record—that a written report be submitted within ten days to the Director of the SBI.

A school that has its own effective disciplinary procedures for students may well decide not to report to law enforcement authorities every act of student misconduct that may technically constitute a crime, but the school policy should give school employees guidance in determining whether to report.

If the report concerned a petty theft of a student's or a teacher's wallet from a locker in a state educational institution (note that the statute speaks of thefts *from* school property—in this case a wallet—as well as thefts *of* school property), the SBI probably would let the local police handle it. If there was a major rash of thefts, however, it might exercise its discretion and investigate. Complex crimes such as embezzlement are the ones most likely to be investigated by the SBI.

The statute provides no specific penalty for the state employee who violates its provisions. Any willful failure to report, delay in reporting, or failure to cooperate with an SBI investigation would at the very least be misconduct subject to administrative discipline. It is almost certainly also a crime. The common law rule is that if a statute makes an act or omission unlawful or commands that a thing be done or not done but fails to specify either any mode of enforcing it or any penalty for violating it, the violation is a general misdemeanor.[55] A general misdemeanor is punishable by a fine in the discretion of the court, imprisonment for up to two years, or both.[56]

If the crime is minor and is eventually reported to the police in due course, a state employee's failure to report the incident to his or her immediate supervisor would probably cause no difficulty, for state employees have not been systematically informed of the reporting statute. Technically, ignorance of the law is no excuse,[57] but the criminal law nevertheless generally requires a showing of criminal intent.[58] Thus, if the state employee who learned of or got evidence of the crime involving state property took reasonable actions in good faith, the likelihood of prosecution would be remote even if the reporting statute was violated. But if there appears to be any covering-up of a crime involving state property or any obstruction of an SBI investigation, a criminal prosecution should not be ruled out. The State need not prove knowledge of the statute on the part of the employee in order to make its case.

Miscellaneous Reporting Statutes

A number of statutes require or regulate the reporting of certain matters either by the general public or by school personnel. These statutes are aimed at concerns other than the commission of a crime, but some of the matters to be reported could also involve criminal activity. A brief and necessarily selective listing of reporting provisions follows.

Accident Reports under Motor Vehicle Law. If the driver of a vehicle is involved in a collision resulting in injury to or death of any person or property damage apparently totaling $500 or more, the driver must immediately report the collision to law enforcement authorities and also fill out forms giving proof of financial responsibility.[59] This require-

55. State v. Bishop, 228 N.C. 371 (1947); State v. Bloodworth, 94 N.C. 918 (1886); State v. Parker, 91 N.C. 650 (1884).

56. N.C. GEN. STAT. § 14-3(a) (1981).

57. PERKINS & BOYCE, *supra* note 3, at 1028-43.

58. See note 26, *supra*.

59. N.C. GEN. STAT. § 20-166.1 (Supp. 1985).

ment applies to all vehicles[60]—not just motor vehicles[61]—and to all collisions wherever they occur.[62] Any driver involved must report, whether or not he was at fault in causing the collision.

The companion hit-and-run law requires a driver to stop the vehicle immediately following *any* collision in which he is involved, render aid to anyone who is injured, and give pertinent information to other persons involved in or owning property involved in the collision.[63] When the property owner is not on the scene, a report may instead be made to law enforcement authorities.[64]

Boating Accident Reports. If a boating accident results in death or injury to a person or property damage greater than $100, the vessel operator involved must report information concerning the accident to the North Carolina Wildlife Resources Commission.[65]

Reports to Medical Examiners. Anyone who knows or suspects that a death was violent, unnatural, or suspicious must report it to the county medical examiner.[66] The reporting statute first lists attending physicians, hospital employees, law enforcement officers, funeral home employees, and emergency medical technicians. Only at the end of this list does it include relatives and other persons having suspicion of such a death. This structure makes it obvious that a person who is not dealing professionally with the body needs to report only when there is some reason to believe that the report would not otherwise be made.

In addition, anyone who discovers anatomical material suspected of being part of a human body must report the find to the county medical examiner.[67] If a body is brought to North Carolina for disposal from out of state, anyone who suspects that the death was not investigated properly or that there is not an adequate death certificate must report the suspicion.[68] This report may be made to the county medical examiner or to the Chief Medical Examiner.

Health Reports. Many statutes require various types of health reports, but almost all of them fall outside the scope of this article because either no crime is likely to be involved or the duty is placed on health professionals not likely to be school personnel. Still, a pair of statutes specifically relating to school personnel are worth noting.

G.S. 130A-136 requires school principals and day-care operators to notify the local health director of any person within the school or day-care facility who is suspected of having a communicable disease that the regulations of the Commission for Health Services require to be reported.[69]

G.S. 130A-155(c) requires that both public and private schools (K-12) file an immunization report to be filed with the Department for Human Resources within 60 days after the new school year begins. The report must give both the number of students attending and numerical breakdowns on those who, for various reasons,[70] did not get the required immunizations.[71] The statute does not specify who at the school must report, but obviously the duty falls on the principal or other person in direct charge of administering a school.

Other Provisions Governing Reports of School Personnel. Numerous provisions relate to reports by school personnel within the system. It will be useful to note the major statutory provisions, though they would rarely encompass criminal activity. G.S. 115C-276(p) empowers the superintendent to require teachers to make reports to principals and to require principals to report to him. G.S. 115C-288(b) requires principals to make all reports to the superintendent and enumerates certain types of reports. It first mentions reports that the board requires principals to make but later affirms the superintendent's power to require reports from principals. G.S. 115C-288(d) specifically

60. "Vehicle" includes every device for transporting any person or property on a highway except devices moved by human power or used exclusively on fixed rails or tracks; bicycles, however, are vehicles. N.C. GEN. STAT. § 4.01(49).

61. A "motor vehicle" includes every self-propelled vehicle and every vehicle designed to run on the highways that is pulled by a self-propelled vehicle. Mopeds are exempted from this definition, however; they are only "vehicles." *Id.* § 4.01(23).

62. Most traffic offenses are limited to events that occur on highways; some of the more serious offenses are also crimes if they occur on public vehicular areas. See N.C. GEN. STAT. §§ 4.01(13), (32) (Supp. 1985) for the definitions of "highway" and "public vehicular area." The hit-and-run and accident-reporting provisions are unusual in applying everywhere. [N.C. GEN. STAT. § 20-166.1(c) (Supp. 1985), however, does have a special provision on reporting procedure when the collision is with a motor vehicle parked on a street or highway.]

63. *Id.* § 20-166 (1983, Supp. 1985).

64. *Id.* § 20-166(c1) (Supp. 1985).

65. *Id.* § 75A-11 (1985); 15 N.C.A.C. 10F .0202.

66. *Id.* § 130A-383(a) (Supp. 1985).

67. *Id.* § 130A-383(b).

68. *Id.* § 130A-384.

69. *Id.* § 130A-134 (Supp. 1985) requires the Commission for Health Services to establish by rule the reportable communicable diseases. See 10 N.C.A.C. 7A .0101.

70. The report must list the number of children who had not obtained the required immunization within 30 days, the number who received a medical exemption, and the number who received a religious exemption. N.C. GEN. STAT. § 130A-155(c) (Supp. 1985).

71. Certain immunizations are required by statute, and the Commission for Health Services can add diseases to the required list in the interest of public health. N.C. GEN. STAT. § 130A-152 (Supp. 1985); 10 N.C.A.C. 7A .0401 to 7A .0405.

governs fire drill requirements and the monthly reports that principals must make concerning them. G.S. 115C-307(g) governs reports by teachers. The law provides that the vouchers for pay of principals and teachers may not be approved until the required monthly and annual reports are made;[72] these reports apparently refer to those formally required by the board of education. In addition, for all school personnel, it is a misdemeanor to knowingly or willfully falsify a report that is required to be made in the performance of duty.[73] The Superintendent of Public Instruction must revoke the certificate of anyone convicted of this offense.[74]

The final report provision to be treated here does impinge on criminal behavior. G.S. 115C-381 provides procedures for reporting unlawful absence or lack of attendance to the school social worker. The school social worker has authority to report and verify on oath the necessary criminal warrants and other documents for prosecuting violations of the school attendance law. The statute governing attendance formerly provided for school attendance counselors to perform these duties, and it therefore authorizes local boards of education to give holdover school attendance counselors the powers of school social workers.[75]

72. N.C. GEN. STAT. §§ 115C-285(c), -303(b) (1983).

73. *Id.* §§ 115C-276(p), -288(b), -307(g), -317 (1983).

74. *Id.*

75. The provision states: "Provided, that persons now employed by local boards of education as attendance counselors shall be deemed qualified as school social workers under the terms of this Part subject to the approval of said local boards of education." *Id.* § 115C-381 (Supp. 1985). The effective date of the shift from attendance counselors to school social workers was July 1, 1985, and the "now employed" in the proviso would refer to that date.

Conclusion

Assuming that public school personnel are state employees, they have a legal duty to report crimes involving state property. In addition, being in close contact with children who may show signs of abuse or neglect, they must be particularly aware of the duty placed on all persons to report suspected juvenile abuse or neglect to the director of the county department of social services. Reportable abuse or neglect of *juveniles* covers a good deal more than just the crimes of felony and misdemeanor *child* abuse, and technically it is not merely the crime that is reported. The county department of social services investigating the report is required to report to the district attorney cases that apparently involve criminal conduct.

Obviously disruptive conduct can occur within the school that should be directly reported to law enforcement authorities; the same can be said for serious cases of child victimization outside the school that come to light in school. The school should develop policies in regard to what should be reported and who should do it. If there is any question of liability for making reports that turn out to be mistaken, it is important to note that the law on reporting suspected juvenile abuse and neglect provides immunity to those who make the reports in good faith.

A school that has its own effective disciplinary procedures for students may well decide not to report to law enforcement authorities every act of student misconduct that may technically constitute a crime, but the school policy should give school employees guidance in determining whether to report. Without rational guidelines, even if the failure to report is not a crime, that failure could subject a teacher or other school employee to a charge of using poor judgment in not reporting. ■

Coming School Law and Management Conferences at the Institute of Government

PEP Update #3. September 24-25, 1986. This is an update conference for the graduates of Principals' Executive Programs I, II, V, and VI. The focus will be on the *Carnegie Task Force Report on Teaching As a Profession,* decision making, school improvement projects, and recent developments in school law. A post-conference session on project management will be held Thursday afternoon, September 25.

Space will be available for 40 other PEP principals. Please call the PEP office (919/966-4706) to reserve one of these places.

Community College Law Conference for administrators and board attorneys. October 30-31, 1986.

School Attorneys' Conference for board attorneys and superintendents. February 6-7, 1987.

School Law Conference for board members and administrators. March 17-18, 1987.

PEP Update #4. April 7-8, 1987. This is an update conference for the graduates of PEP III, IV, VII, and VIII. Space also will be available for 40 other PEP principals.

Clearinghouse

Edited by Laurie Mesibov

COLLECTIVE BARGAINING AGREEMENT THAT LIMITED LAYOFFS OF MINORITY-GROUP TEACHERS IS UNCONSTITUTIONAL. *Wygant v. Jackson Board of Education,* 106 S.Ct. 1842 (1986).

Facts: In 1972 the Jackson (Michigan) Board of Education and the Jackson Education Association, a teachers' union, included in their collective bargaining agreement a provision covering layoffs. This provision, Article XII, was ratified in six consecutive contracts. It provided that if layoffs of teachers became necessary, those with the most seniority would keep their jobs, except that the percentage of minority personnel among the teachers laid off would not be greater than the percentage of minority personnel among the teachers then employed. In other words, this provision departed from the "last hired, first fired" rule just enough to maintain the same percentage of blacks on the faculty after layoffs as before. When layoffs were necessary in 1974, the board refused to follow this agreement. The union and two minority teachers sued, and Article XII was upheld in state court. The board then complied with the provision in 1976-77 and 1980-81, when it laid off white teachers while retaining minority teachers with less seniority. A group of white teachers with seniority who had lost their jobs sued, alleging violations of the equal protection clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964. The federal district court upheld the layoff provision, holding that the racial preferences were permissible as an attempt to remedy societal discrimination by providing "role models" for minority school children. The Sixth Circuit Court of Appeals affirmed. The teachers sought review of their Fourteenth Amendment claim by the United States Supreme Court.

Holding: The Court reversed, holding that the preferential protection in Article XII against layoffs of minority teachers violated the equal protection clause. The vote on the decision was 5-4, and five separate opinions were written, none of which was supported by more than four justices. Justice Powell announced the Court's decision.

In the plurality opinion the Court applied a two-prong test to the racial preference in the layoff plan: Was it justified by a compelling governmental interest, and were the means chosen by the government narrowly tailored to accomplish that goal. The Court rejected the board's argument that its interest in providing role models for minority students, as an attempt to alleviate the effects of societal discrimination, was important enough to justify the racial classification. Societal discrimination alone has never been found to be sufficient to justify a racial classification; without more, societal discrimination is too amorphous a basis for imposing a racially classified remedy that works against innocent people. Some showing of past discrimination by the governmental unit has been required as the justification for, and the limitation on, a state's adoption of race-based remedies.

The role-model theory has no logical stopping place and allows the board to engage in discriminatory practices long past the point required by any legitimate remedial purpose. In addition, the theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices; it could be used to avoid remedying such practices by justifying a small percentage of black teachers by reference to the small percentage of black students.

Before it embarks on an affirmative action program, a public employer must have a strong basis in evidence (of prior discrimination) for its conclusion that remedial action is necessary. However, it is not necessary that a "competent" body have made a formal finding of prior discrimination, and a plan need not be limited to remedying specific instances of identified discrimination. In this case, no determination of past discrmination by the board of education had ever been made; in fact, in earlier litigation the courts concluded that disparities had resulted from general societal discrimination, not from board actions. The Court refused

to consider whether the board could now establish past discrimination, since it found that the plan failed the strict scrutiny required by the second prong of the test.

The Court recognized that race may sometimes have to be taken into account in order to remedy the effects of past discrimination and that innocent persons may have to bear some of the burden of the remedy. In cases involving valid hiring goals, the burden borne by innocent individuals is diffused to a considerable extent among society generally. Layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives and settled expectations. The Court labeled that burden "too intrusive" and held that the layoff plan is not tailored narrowly enough to serve as a means of accomplishing purposes that otherwise may be legitimate. Other, less intrusive means—like the adoption of hiring goals—are available to correct past discrimination by a governmental actor.

MEMBER OF SCHOOL BOARD LACKED STANDING TO APPEAL FEDERAL DISTRICT COURT RULING THAT PERMITTED HIGH SCHOOL STUDENT PRAYER GROUP TO MEET. *Bender v. Williamsport Area School District,* 106 S.Ct. 1326 (1986).

Facts: A group of high school students in Williamsport, Pa., formed "Petros," a club to promote spiritual growth and positive attitudes in the lives of its members. At an organizational meeting held during a student activity period, passages of scripture were read and some students prayed. The superintendent and the board of education refused to allow the club to hold further meetings at school during activity periods because of the club's religious actitivies. The students sued, alleging that the refusal violated the First Amendment. They sought declaratory and injunctive relief. The district court, on motions for summary judgment, ruled in the students' favor, finding that the school system had acted unconstitutionally by basing its refusal to allow club meetings on the religious content of the students' speech. The court did not enter an injuction or granted any relief against any defendant in his individual capacity. The board itself did not appeal; it complied with the judgment and allowed the club to meet. However, one member of the board, Youngman, appealed. His standing to appeal was not questioned, and the Court of Appeals for the Third Circuit held in his favor. The students appealed.

Holding: The United States Supreme Court vacated the circuit court's decision, so that the district court's order was reinstated. It held that Youngman had no standing to appeal the district court's declaratory ruling and therefore the court of appeals had no jurisdiction to hear the case. Justice Stevens explained that courts have authority to hear and decide only those cases properly brought before them. Before a federal court has jurisdiction over a case, the party that brings the lawsuit must have "standing." Standing focuses on whether the plaintiff is a proper party to bring the lawsuit, not on the merits of the case. A plaintiff must allege facts that demonstrate that he personally has suffered an actual or threatened injury resulting from the putatively illegal conduct of the defendant and that the injury is likely to be redressed by a decision in the plaintiff's favor. The Court examined three possible sources of standing for Youngman, rejected each one, and concluded that Youngman did not have a sufficient stake in the outcome of the litigation to support appellate jurisdiction.

Youngman had no standing to appeal in his individual capacity. Although the complaint alleged that the action was brought against the defendant school board members "in their individual and official capacities," nothing else in the complaint or in the record supported the suggestion that relief was sought or awarded against any board member in his *individual* capacity. Youngman was sued only in his official capacity; he had no personal stake in the outcome of the litigation and therefore no standing to appeal in that capacity.

Youngman also lacked standing in his official capacity as a board member. Although the board itself had a sufficient stake in the outcome to appeal, Youngman, as an individual member, could not invoke the board's interest—could not "step into the shoes of the board"—to confer standing on himself. Youngman apparently was the lone dissenter from a decision by the other eight members of the board to forego an appeal; he did not have standing to perfect an appeal the board itself had declined to take.

Youngman had no standing in his capacity as a parent of a student attending the high school. The record carried no indication that his status as a parent suffered or that he or his children suffered any injury as a result of the district court's judgment or the club's activities. Since Youngman was sued only as a board member, he had no right to participate in the district court proceedings as a parent unless he intervened in the suit in that capacity. Because Youngman did not take that action or present any factual support for his interest as a parent in the Supreme Court, he had no right to appeal as a parent.

Justices Burger, White, Rehnquist, and Powell dissented on the issue of standing. They also stated that if the merits of the case had been reached, they would have found that the establishment clause does not require a public high school to prevent a student-initiated, student-led religious group from meeting during an extracurricular activity period. Justice Powell reached this conclusion by relying on the deci-

sion (which he wrote) in *Widmar v. Vincent,* 454 U.S. 263 (1981), which upheld the right of student-initiated religious groups to meet on state university campuses. Powell stated that the only arguable distinction between the two cases is that *Widmar* involved college students and *Bender* involved high school students. The few years' difference in age between these groups of students does not justify departing from *Widmar.*

[Editor's Note: The Court had been expected to decide whether to extend *Widmar* to high schools and to determine the constitutionality of the Equal Access Act. In the absence of any controlling judicial decision to the contrary (there is none in the Fourth Circuit), boards of education should assume that the Equal Access Act is constitutional and comply with it.]

UNION PROCEDURE FOR COLLECTING NONMEMBERS' CONTRIBUTIONS TO COLLECTIVE BARGAINING COSTS UNDER AGENCY-SHOP CONTRACTS MUST MEET CONSTITUTIONAL REQUIREMENTS. *Chicago Teachers Union, Local No. 1 v. Hudson,* 106 S.Ct. 1066 (1986).

Facts: The Chicago Teachers Union (CTU) is the exclusive collective bargaining representative of the educational employees of the Chicago Board of Education. Until 1982, CTU's membership dues financed the entire cost of collective bargaining and contract administration. Nonmembers (about 5 per cent of the eligible employees) received the benefits of union representation without contributing to its costs. The Illinois School Code dealt with this "free rider" problem by authorizing the deduction of "proportionate share payments" from nonmembers' paychecks. The deduction was to cover the nonmembers' share of collective bargaining costs, but not costs for unrelated political and ideological activities. Under an agreement between CTU and the school board, CTU unilaterally determined that the proportionate share was 95 per cent of the union dues. The board accepted the figure without questioning it. CTU also established the procedure for considering nonmembers' objections to the deductions. A nonmember could object to the amount only after the first deduction was made and then had 30 days to object by writing to CTU's president. A three-stage procedure, controlled by CTU, followed; the final decision was made by an arbitrator selected by CTU from a list maintained by the Illinois Board of Education. If the objection succeeded at any stage in the procedure, the remedy was a reduction in future deductions for all nonmembers and a rebate for the objector. Several nonmembers objected and, rather than follow this procedure, sued in federal court. They claimed that the procedure violated their First Amendment rights to freedom of expression and association and their Fourteenth Amendment due process rights and permitted the use of their shares for impermissible purposes. The district court upheld the procedure, and the plaintiffs appealed, focusing on the procedures used to determine the amount of the deductions and to respond to their objections. Even though CTU had by this time voluntarily placed all the objecting employees' fees into escrow, the Seventh Circuit Court of Appeals reversed. The United States Supreme Court agreed to hear the case.

Holding: The Supreme Court affirmed in a unanimous decision. In an opinion by Justice Stevens, the Court held that the constitutional requirements for a union's collection of agency fees include (1) an adequate explanation of the basis for the fee, (2) a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision-maker, and (3) an escrow for the amounts reasonably in dispute while such challenges are pending.

The Court considered whether CTU's procedures adequately respected the distinction drawn in *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977). In that case the Court held that public employers may designate a union as the exclusive collective bargaining representative of its employees (an agency shop) and require nonunion employees, as a condition of employment, to pay a fair share of the union's cost of negotiating and administering a collective bargaining agreement. The Court also held that nonunion employees have a First Amendment right to stop the union from spending a part of their required fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative.

Procedural safeguards are necessary to protect employees' First Amendment rights without restricting the union's ability to require every employee to contribute his fair share. First analyzing CTU's procedure as it existed before the union established the escrow, the Court found three flaws. (1) The procedure failed to minimize the risk that nonmembers' contributions might be used for impermissible purposes; (2) it failed to provide adequate justification for the amount of the proportionate share, and (3) it failed to offer a reasonably prompt decision by an impartial decision-maker. The creation of escrow cures only the first of these flaws. The remaining shortcomings must be corrected to minimize both the impingement on the nonunion employees' First Amendment rights created by an agency shop and the burden of objecting to the deduction under the arrangement between CTU and the board.

The Court also concluded that the CTU was not constitutionally required to place 100 per cent of the funds into

escrow as a "cushion" because no dissenter could reasonably challenge the entire fee deduction.—*TE*

Trudy Ennis is a third-year student at the UNC Law School who has served for the past year as a law clerk at the Institute of Government.

UNITARY SCHOOL DISTRICT MAY END BUSING OF ELEMENTARY SCHOOL STUDENTS AS LONG AS THE DECISION IS NOT MADE WITH DISCRIMINATORY INTENT. *Riddick v. School Board of Norfolk,* 784 F.2d 521 (4th Cir. 1986).

Facts: Stating that it was concerned with resegregation of schools caused by white flight and with decreased parental involvement in schools because of busing, the school board in Norfolk, Virginia, proposed a new pupil assignment plan for the district's elementary schools. Under this plan, mandatory cross-town busing, which had first been required by court order in 1971, would be abolished for elementary students. All elementary schools would become single attendance zone schools (neighborhood schools); each zone would be gerrymandered to achieve maximum racial integration. Twelve of Norfolk's thiry-six elementary schools would be 70 per cent or more black, compared with four under the present busing plan. Of those twelve schools, ten would be at least 95 per cent black. Six schools would become at least 70 per cent white. The plan contains a majority-minority transfer option, which permits any student assigned to a school at which his race constitutes 70 per cent or more of the student body to transfer to a school where his race is a minority of the student body. Free transportation is provided for students who transfer. The plan also includes a parental-involvement program and multi-cultural programs to expose students in racially isolated elementary schools to students of other races. A class of black school children sued, contending that the new assignment plan was racially motivated and implementing it would violate the Fourteenth Amendment. The district court refused to invalidate the plan, and the plaintiffs appealed.

Holding: The Court of Appeals for the Fourth Circuit affirmed, holding that because Norfolk's school system is "unitary" (fully desegregated), the plan would be unconstitutional only if the board had a discriminatory intent in adopting it. The board was not required to prove that it had no discriminatory motive. Instead, because the system was unitary, the burden of proof was on the plaintiffs, a burden they did not meet. Although the court found the creation of several overwhelmingly black schools "disquieting," the fact of a large black majority did not by itself prove an intent to discriminate on the basis of race. The board's stated purposes for the neighborhood school assignment plan were not pretextual. The plan is a reasonable attempt to keep as many white students in public schools as possible and thereby to achieve a stable, integrated school system; the plan also represents an attempt to improve the quality of the school system by increasing parental involvement.

The court explained that any school system that operated a state-sanctioned segregated system at the time of *Brown v. Board of Education,* as Norfolk did, has an affirmative duty to desegregate and eliminate all vestiges of the dual system. A system becomes fully desegregated or "unitary" only after it has eliminated all discrimination through official action. The system's faculty, staff, transportation practices, extracurricular activities, facilities, and pupil assignment procedures must all be integrated. The Norfolk system had been declared unitary by a federal district court in 1975, and it remains so in 1986.

As a preliminary matter, the court found that the 1975 district court's finding that the district was unitary could not be relitigated in this lawsuit because of collateral estoppel. (Collateral estoppel or issue preclusion is the principle by which once an issue has been actually and necessarily decided by a court of competent jurisdiction, that decision is binding in subsequent lawsuits involving any party who was given a full and fair opportunity to litigate the issue in the earlier case.)

The court said that there was evidence to support the district court's findings on two key issues. First, Norfolk has lost 6,000 to 8,000 white students because of busing. As a result of this white flight, the school system was becoming more and more black and faced the real danger of resegregation. While white flight may not be used as an excuse to resist or evade a duty to desegregate a dual system, Norfolk's board does not have this duty since it is operating a unitary system. The school board could legitimately consider white fight in devising a voluntary plan to stabilize school integration, since the presence of white students in the schools is necessary to insure a desegregated education. Because busing causes white students to leave the system, the board was justified in reducing busing in an effort to keep them enrolled.

Second, the district court accepted the board's other stated reason for the plan—that is, to achieve more parental involvement in the schools. A drop in PTA enrollment from a high of 20,000 to 3,500 indicated the problem, which was created in part by requiring children to attend schools across town instead of close to home. The plan was a reasonable way to try to increase parental involvement.

The court repeatedly emphasized the significance of Norfolk's status as a unitary system. When a district is found to be unitary, control of the system must be allowed to return to local officials. A court may not order further relief to

counteract resegregation that does not result from the school system's intentionally discriminatory acts, and the burden of proving discriminatory intent rests on a plaintiff in a lawsuit against a unitary system.

STIPEND PAID TO GRADUATE TEACHING ASSISTANT IS TAXABLE INCOME. *Sebberson v. Commissioner of Internal Revenue Service,* 781 F.2d 1034 (4th Cir. 1986).

Facts: The University of Maryland English Department hired 90 graduate students as teaching assistants for freshman English. This teaching was not a required part of the graduate program, and no academic credit was awarded for it. Selection was based on academic performance and potential for becoming a teacher; financial need was only a secondary factor. The stipends were paid from general operating funds, not scholarship funds, and the amount of the stipend was based on a student's teaching experience and academic progress. David and Patti Sebberson each earned $4,286.89 for teaching twenty hours a week during the school year. They excluded portions of the stipend from their 1978 joint federal income tax return, but the Internal Revenue Service disallowed the exclusion. The United States Tax Court held that the excluded income was taxable, and the Sebbersons appealed.

Holding: The Fourth Circuit Court of Appeals affirmed, holding that the money was taxable, not excludable as a "scholarship" as defined by Section 117(a)(1)(A) of the Internal Revenue Code. Under the primary-purpose test, a scholarship does not include money paid to "an individual to enable him to pursue studies or research primarily for the benefit of the grantor." 26 C.F.R. § 1.117-4(c)(2) (1985). The court of appeals agreed with the Tax Court's finding that the purpose of the payments was to compensate the assistants for teaching and to enable the University to discharge its "obligation to impart knowledge."—*TE*

DENIAL OF PROMOTION WAS NOT THE RESULT OF SEX DISCRIMINATION. *Farlow v. University of North Carolina Through Its Board of Governors,* 624 F. Supp. 434 (M.D.N.C. 1985).

Facts: Dr. Betsy Farlow was a tenured associate professor of music at Western Carolina University (WCU). Farlow and Richard Trevarthen developed a comprehensive musicianship curriculum and wrote a text that was used by WCU students but never published. Farlow also presented several unpublished papers at professional seminars. In 1980 she applied for promotion to full professor, but was not promoted because she had not established an appropriate record of profession development as her failure to publish showed. After she exhausted the administrative appeals procedures, Farlow filed a grievance. The grievance committee decided that it lacked jurisdiction to consider her allegations that WCU's affirmative action goals had not been properly considered when she was denied promotion. In 1981 Farlow again applied unsuccessfully for promotion. WCU stated that promotion was denied because she had not published since her earlier application, and thus her professional development had not changed. Farlow sued under Title VII, 42 U.S.C. § 2000e et seq. She alleged that she had been sexually discriminated against in her first application for promotion and that in considering her second application, WCU had retaliated against her for filing a grievance.

Holding: The court dismissed the action, finding no illegal discrimination in either of WCU's decisions not to promote Farlow. With regard to the first application, Farlow did establish a prima facie case of sexual discrimination by showing that (1) the two males who had the most influence in the promotion decision had made sex-based derogatory comments about female faculty members, and (2) WCU failed to follow its own affirmative action plan. However, WCU had a legitimate, nondiscriminatory reason for its decision—Farlow's failure to publish. Farlow then had the opportunity to show that WCU's stated reason was a mere pretext for discrimination. To succeed, Farlow would have to show that although she met the qualifications, she was not promoted while males with similar qualifications were. Farlow was unable to do this, since she did not meet the minimum qualifications for promotion. Comparisons with Trevarthen, who had been promoted to full professor although he had no doctorate and had not published, were not valid. The two had different roles in music education, different standards for evaluation applied, and he had demonstrated professional development as a music theorist through his creative work.

Farlow was unable to show that her second request for promotion was denied in retaliation for her charges of sexual discrimination and that she would have been promoted in the absence of those charges. There had been no significant change in her record for professional development after the first application. She never had the minimum qualifications for promotion and would not have been promoted in any event.—*TE*

DISMISSAL OF CAREER TEACHER FOR INSUBORDINATION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE. *Crump v. Board of Education, Hickory Administrative School Unit,* 79 N.C. App. 372, 339 S.E.2d 483 (1986).

Facts: Eddie Crump, a career-status driver's education

teacher and coach, was dismissed in June 1984 on grounds of immorality and insubordination. The board of education based its decision on a series of events beginning in 1981, when a female student complained to the principal, Mr. Williamson, about Crump's conduct and personal comments during the first day of road work in her driver's education class. When Williamson showed Crump the student's letter of complaint, Crump denied the allegations. Williamson informed Crump that at least two students were to be in the car any time a female was doing road work. Williamson repeated these instructions in a follow-up letter to Crump on April 9, 1981, in which he stated that "failure to cooperate with these instructions could be interpreted as insubordination and neglect of duty." The letter had no expiration date. Crump drove alone with a female student in the summer of 1982 and the fall of the 1983 on occasions when the other assigned driver was absent. Although Williamson had not made arrangements for situations when there was only one student driver, Crump never asked Williamson what he should do in that situation or whether the restriction was still effective. The superior court upheld the dismissal, and Crump appealed.

Holding: The North Carolina Court of Appeals affirmed the superior court's decision because Crump's dismissal was supported by substantial evidence under the "whole record" standard of review explained in *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977). Under this standard the court must consider not only the evidence that in and of itself justifies the board's decision but also contradictory evidence or evidence from which conflicting inferences could be drawn. However, the court may not substitute its judgment for the board's when there are two reasonable conflicting views of the evidence.

G.S. 115C-325(e)(1)(c) provides that a career teacher may be dismissed for insubordination, which the court defined as "a willful disregard of express or implied directions of the employer and a refusal to obey reasonable orders." The board's conclusion that Williamson's instructions to Crump were reasonable and that Crump's refusal to follow these directions was willful and constituted insubordination was supported by substantial evidence in the record. The court did not address whether the dismissal for immorality was justified since substantial evidence supporting either of the grounds for dismissal was sufficient.—*TE*

LOCAL BOARDS OF EDUCATION MAY BAN STUDENTS' USE AND POSSESSION OF TOBACCO PRODUCTS AT SCHOOL. *Craig v. Buncombe County Board of Education*, 343 S.E.2d 222 (N.C. App. 1986).

Facts: In September 1984 the Buncombe County Board of Education adopted a new policy that prohibited students' use and possession of tobacco products on school property. The board's stated reasons for the policy were that use of tobacco products presents a health and safety hazard and possession encourages use. Disciplinary procedures for violations of the policy were the responsibility of individual school principals. Students at Owen High School were told that punishments for violations ranged from a three-day "in-school" suspension for a first offense to a complete expulsion for a fifth offense.

Kim Craig, a student who had been smoking at school with her parents' permission, was repeatedly suspended but nevertheless continued to violate the policy. When the board of education upheld another suspension, Craig and another student who had also been suspended sued both the board of education and the principal. The superior court granted summary judgment for the defendants, and the students appealed.

Holding: The North Carolina Court of Appeals affirmed, holding that the ban on the use and possession of tobacco products by the board of education was a valid exercise of the boards' authority to adopt policies governing the conduct of students. The ban does not deprive students of their fundamental right to an education, since the only right denied them is the "right" to use or possess tobacco on school grounds. As long as a student restricts his smoking to nonschool hours and off school grounds, he is not denied the right to an education. The board had legitimate concerns over students' health, including the effect of tobacco smoke in the air on nonsmokers, the cleanliness of grounds and buildings, fire hazards, and the use of "smoking areas" to smoke illegal cigarettes made of products other than tobacco. These concerns are all reasonably related to the educational process and they provide a rational basis for the policy.

The court went on to say that the equal protection clauses of the federal and state constitutions are not violated by a policy that forbids students to use and possess tobacco but permits teachers to smoke in their lounge. The students' youth and the goals of education justify regulating their conduct. The primary justification for the ban—discouraging smoking to prevent adolescents from becoming addicted to tobacco products—does not apply to adults. On that basis alone, the distinction between students and teachers is proper.—*Martha Cromartie*

Ms. Cromartie is a second-year student in the University of North Carolina School of Law. She spent the summer of 1986 as a law clerk at the Institute of Government.

A RESIGNATION BY A TENURED PRINCIPAL MAY BE ACCEPTED BY THE SUPERINTENDENT AND MAY TAKE EFFECT BEFORE IT IS APPROVED BY THE BOARD OF EDUCATION. *Warren v. Buncombe County Board of Education,* 343 S.E.2d 225 (N.C. App. 1986).

Facts: On October 11, 1984, William Warren, principal of Enka High School, delivered a letter of resignation to N. Andrew Miller, superintendent of the Buncombe County Schools, who later that day accepted the resignation. A week later, after a replacement had been found for the position, Warren sought to withdraw his resignation, but was told by Miller that it was too late to do so. That evening, at its regular monthly meeting, the board of education approved Miller's acceptance of the resignation. Warren contended that the board had improperly terminated his employment, since his resignation had been withdrawn before the board had approved it. Although it questioned Warren's right to a hearing, since he had not been demoted or dismissed, the board gave Warren a hearing and upheld its approval of the resignation. Warren then appealed to the superior court, which affirmed the board's decision; he appealed again.

Holding: The North Carolina Court of Appeals affirmed, holding that a tenured principal may resign whenever he chooses and the resignation may be effective before it is approved by the board. G.S. 115C-325(o) expressly recognizes that a resignation is solely the teacher's decision and that the superintendent is authorized to accept the resignation. (Principals are "teachers" under G.S. 115C-325.) No statute prohibits a superintendent from accepting resignations, nor does any statute require a board to act directly on a teacher's resignation or to approve the superintendent's action on a resignation. To protect both teachers and the public, G.S. 115C-325 does specify how the board must act in hiring, promoting, dismissing, or disciplining teachers. A resignation is different from these personnel actions because it is the individual employee's decision and cannot be changed by the superintendent or board. Warren's decision was final when he resigned and Miller accepted the resignation. The board of education's later approval was "a gratuitous but meaningless formality."

The court also addressed whether Warren had a right to appeal the board's decision to the superior court and the appeals court, although neither party had raised this issue. Warren sought review of the board's action pursuant to G.S. 115C-325(n), which provides for appeals by teachers who have been dismissed, demoted, or suspended without pay, and G.S. 115C-45(c), which provides for appeals when a board's decision affects a teacher's character or right to teach. The court did not decide whether Warren had the right to appeal under either of these statutes because it found that G.S. 115C-305, which was enacted after G.S. 115C-325(n) and -45(c), clearly authorized the appeal. That statute says, "Appeals to the local board of education or to the superior court shall lie from the decisions of *all* school personnel, *including decisions affecting character or the right to teach,* as provided in G.S. 115C-45(c)" (emphasis supplied by the court). The court found that this language indicates that the General Assembly intended to extend the right of appeal in public school personnel decisions far beyond the confines of the former law.

Judge Arnold dissented and voted to dismiss the appeal. In his view, Warren was not entitled to judicial review of the board's action under either G.S. 115C-325(n) or G.S. 115C-45, the two statutes on which he had relied.—*MC*

THE DEPARTMENT OF SOCIAL SERVICES HAS THE RIGHT, IN PROPER CIRCUMSTANCES, TO INTERVIEW A CHILD ON SCHOOL GROUNDS. *Wilson County Department of Social Services v. Wilson County Board of Education,* No. 86 CVD 286 (D.N.C. final order filed April 25, 1986).

Facts: A high school student told the guidance counselor that his father had beaten him with an electrical cord and that his mother had told him not to tell anyone about the beating. The counselor also saw marks on the child's face. She believed that the child had been abused and reported this to the principal. He directed her to inform the department of social services (DSS) of her suspicions, which she did. The following afternoon a DSS social worker called the school to say that she would interview the student at the school later that day. The principal instructed the counselor not to permit the interview without prior notice to the parents. No such notice was given, and when the social worker arrived, she was told she could not interview the student. A temporary restraining order was obtained by DSS, permitting the social worker to interview the child at school.

Final order: The district court stated that DSS has the right, in proper circumstances to interview a child on school grounds. The court did not define "proper circumstances," but concluded as a matter of law that the facts in this case constituted proper circumstances. Here the father was the alleged abuser, the mother had actively sought to hide that fact, there were reasonable grounds to believe that the father did commit the abuse alleged, and the interview was crucial to the child's welfare. The court also said that in proper circumstances the interview with the child may be conducted without notice to the parents, and it found that the circumstances in this case justified this action.

The court was unwilling to make any blanket rule cover-

ing interviews at school by DSS employees. Instead, it will continue to consider denials of an opportunity to interview children at school during school hours, with or without notice to parents, on a case-by-case basis. There was no evidence to show that the board of education has a policy on interviews of children that constitutes a continuing danger to other children. There was also insufficient evidence to show that the lack of a specific policy creates any continuing danger to children.

The temporary restraining order was continued as a preliminary injunction. The board of education was enjoined from taking any action to prevent DSS from interviewing this student at school at reasonable times and places, so long as the interviews are not an unreasonable intrusion on school functions, all without regard to parental notice or consent.

The court noted that school officials have immunity from any civil liability for assisting and cooperating with DSS in its investigations of abuse and neglect as well as for reporting alleged abuse to DSS.

SATELLITE SCHOOLS DO NOT QUALIFY AS NON-PUBLIC SCHOOLS. *Formal Attorney General's Opinion,* February 14, 1986.

Question: Are parents who educate their child in a home school, which has not met the requirements of Article 39, G.S. Chapter 115C but has been created as a satellite by a recognized home school, in compliance with the Compulsory Attendance Law?

Opinion: No, parents who are educating their children in a home school that has not been recognized by the Office of Non-Public Schools as meeting the requirements of G.S. Chapter 115C, Article 39, are violating G.S. 115-378, the Compulsory Attendance Law. In *Delconte v. North Carolina,* 313 N.C. 384, 329 S.E.2d 636 (1985) [see 16 SCHOOL LAW BULLETIN 28 (Summer 1985)], the State Supreme Court held that parents may satisfy the compulsory school attendance law by educating their children at home schools under certain circumstances. These schools must meet certain objective statutory standards to qualify as a "school." Each school must maintain certain records, operate on a regular schedule, and be subject to reasonable fire, health, and safety inspections. Allowing a recognized home school to colonize or create another school would circumvent the state's interest in effective inspection, supervision, and control. There is no authority, express or implied, for one home school to create another, separate school.—*TE*

ACCESS TO TEACHERS' FILES. *Informal Attorney General's Opinion,* February 25, 1986.

Question: What right of access to teachers' files do the board of education and its individual members have?

Opinion: A board of education, acting as a board, has the authority to inspect teachers' pre-employment and personnel files, but individual board members may do so only to the extent permitted by the board. G.S. 115C-325(b) states, "[The teacher's] personnel file shall be open for the teacher's inspection at all reasonable times but shall be open to other persons only in accordance with such rules and regulations as the board adopts." This constraint places an affirmative duty on the local board to adopt rules and regulations for access to a teacher's file by persons other than the teacher. To fufill its responsibilities to make employment decisions and provide students with an adequate education, school boards must have access to teachers' files. The board itself is not an "other person" within the meaning of the statute. Also, by implication, principals, supervisors, and other administrators who are responsible for employing or evaluating teachers, acting in their official capacities, are not "other persons" within the meaning of G.S. 115C-325(b) and should have access to teachers' records.

Because a board is authorized to act only as a board, the authority, if any, for an individual board member to inspect a teacher's files must come from the board itself. An individual board member who seeks access to a teacher's file should be treated as an "other person" and denied access to the file except in accordance with the rules and regulations established by the board. Board policies should specify which persons are entitled to access, the circumstances in which access is to be granted, and the nature and extent of such access.

SOCIAL SERVICES DIRECTORS MAY NOT CONSENT TO EDUCATION SERVICES FOR EXCEPTIONAL CHILDREN WHO ARE IN THE CUSTODY OF DEPARTMENTS OF SOCIAL SERVICES. *Formal Attorney General's Opinion,* March 12, 1986.

Question: Do directors of county departments of social services have authority to consent to educational services for exceptional children who are in the legal custody of departments of social services (DSS)?

Opinion: No, when the parents of a handicapped child are unavailable or unknown and the child is a ward of the state, the responsibility and authority for representing that child's educational interests rests with a surrogate parent, not with the county director of social services. Federal and state laws are designed to assure that educational decisions for the handicapped child will be made by someone whose sole interest is the welfare of the child, not by an employee of a public agency involved in the education or care of the child. G.S. 115C-116(c) and 20 U.S.C. § 1415(b)(1). Since a

department of social services with custody of a handicapped child is clearly involved in the education or care of that child, neither the county director of social services nor any other department employee may serve as a surrogate parent. G.S. 7A-647(2)(c) seems to permit a director of social services to make educational decisions in this situation. This apparent conflict should be resolved by giving full effect to the federal statute.

STATE LAW DOES NOT REQUIRE PRIVATE ELEMENTARY AND SECONDARY SCHOOL TEACHERS TO HAVE HEALTH CERTIFICATES. *Informal Attorney General's Opinion,* March 12, 1986.

Question: Must private elementary and secondary school teachers have health certificates before they are hired?

Opinion: State law cannot reasonably be interpreted to require private elementary and secondary school teachers to obtain health certificates before employment or at any other time. The policies and requirements in Article 39 of G.S. Chapter 115C provide that private schools that comply with Part I and II of that Article are not subject to any other provision of law relating to education except requirements respecting fire, safety, sanitation, and immunization. The reference to laws "respecting safety" refers to the safety of private school facilities, not to protecting the safety of students and employees from communicable diseases through the health certificate requirement imposed on public school employees by G.S. 115C-323. However, as a matter of sound policy, private school officials should require teachers and other employees to have health certificates in order to protect the health of students and employees and to protect themselves against possible liability for failure to protect the health of children adequately.

REFERENDA AND MERGER OF SCHOOL ADMINISTRATIVE UNITS. *Informal Attorney General's Opinion,* March 12, 1986.

Question: What is the extent to which referenda are permitted, required, or binding in connection with a decision to merge school administrative units?

Opinion: Merger of school administrative units within one county may be accomplished by following the process in G.S. 115C-67. There are three basic steps in this process: (1) the local boards of education involved must agree on a merger plan; (2) the board of county commissioners must approve of the plan; and (3) the State Board of Education must approve of the plan. A plan need not include a referendum, and merger may be accomplished without a vote. However, in developing a plan, local boards must consider whether the merger will be contingent on the results of a referendum and their decision must be stated in the proposed plan. After the boards of education agree on the plan, it is submitted to the board of county commisioners. The commissioners may approve or reject the plan on any ground they deem sufficient, including the presence or absence of a referendum. The county commissioners have no independent legal authority to require that the plan include or exclude a referendum.

There appears to be no mechanism by which a referendum may be forced on the issue of merger if it is not contained in the merger plan. G.S. 115C-503 and -504 do authorize the submission to local school boards of petitions calling for referenda for the purposes listed in G.S. 115C-501, but merger is not among these purposes.

If a merger plan calls for a referendum, it would be held after the State Board of Education approves the plan at a time set in accordance with G.S. 115C-507 and G.S. Chapter 163. The implementation of that merger plan would depend on the results of the referendum, but a vote against merger would not preclude future merger efforts.

Merger may also been accomplished through local legislation. The effect, if any, of a referendum on merger pursuant to local legislation would depend on the terms of that legislation. ■

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